No. 90-985-CFX
Status: GRANTED

Title: Jayne Bray, et al., Petitioners
v.
Alexandria Women's Health Clinic, et al.

Docketed:
December 18, 1990

Court: United States Court of Appeals
for the Fourth Circuit

See also:
90-1575

Counsel for petitioner: Sekulow,Jay Alan

Counsel for respondent: Schafer,John H., Burns,Sarah

Entry	Date	Note	Proceedings and Orders
1	Dec 18 1990	G	Petition for writ of certiorari filed.
2	Jan 22 1991		Brief of respondents Alexandria Clinic, et al. in opposition filed.
3	Jan 23 1991		DISTRIBUTED. February 15, 1991
4	Feb 1 1991	X	Reply brief of petitioners Jayne Bray, et al. filed.
6	Feb 15 1991		REDISTRIBUTED. February 22, 1991
7	Feb 25 1991		Petition GRANTED.
			**********
8	Apr 9 1991		Joint appendix filed.
9	Apr 11 1991		Brief amici curiae of Feminists for Life of America, et al. filed.
10	Apr 11 1991		Brief amici curiae of Daniel Berrigan, S.J., et al. filed.
11	Apr 11 1991		Brief amicus curiae of Rutherford Institute filed.
12	Apr 11 1991		Brief of petitioners Jayne Bray, et al. filed.
13	Apr 11 1991		Brief amicus curiae of Free Congress Foundation filed.
14	Apr 11 1991		Brief amicus curiae of Concerned Women for America filed.
15	Apr 11 1991		Brief amicus curiae of United States filed.
16	Apr 11 1991		Record filed.
		*	Lodging received, 9 copies
17	Apr 11 1991		Brief amici curiae of National Right to Life Committee, Inc., et al. filed.
18	Apr 11 1991		Brief amicus curiae of American Victims of Abortion filed.
19	Apr 11 1991		Brief amici curiae of Women Exploited by Abortion, et al. filed.
20	Apr 11 1991		Brief amicus curiae of Southern Center for Law & Ethics filed.
21	Apr 11 1991		Brief amicus curiae of James Jospeh Lynch, Jr. filed.
22	Apr 11 1991		Brief amici curiae of George Lucas, et al. filed.
23	Apr 19 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	May 13 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
25	May 13 1991		Lodging received, 10 copies (Box)
26	May 13 1991		Brief amicus curiae of 29 Organizations Committed to Women's Health filed.
27	May 13 1991		Brief amicus curiae of Falls Church, VA filed.
28	May 13 1991		Brief amici curiae of National Abortion Federation, et al. filed.
29	May 13 1991		Brief of respondents Alexandria Clinic, et al. filed.
30	May 13 1991		Brief amici curiae of Attorneys General of the State of New

No. 90-985-CFX

Entry	Date	Note	Proceedings and Orders
			York, et al. filed.
31	May 13 1991		Brief amici curiae of ACLU, et al. filed.
32	May 13 1991		Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
33	Jun 12 1991		Reply brief of petitioners Jayne Bray, et al. filed.
34	Jul 12 1991		CIRCULATED.
35	Jul 19 1991		SET FOR ARGUMENT WEDNESDAY, OCTOBER 16, 1991. (1ST CASE)
36	Jul 24 1991		Certified copy of original record and proceedings, 8 Volumes, in one box received.
37	Oct 3 1991	X	Supplemental brief of petitioners Jayne Bray, et al. filed.
38	Oct 11 1991		Copy of the injunction dated September 20, 1991 received and distributed.
39	Oct 16 1991		ARGUED.

90-985

No.——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

PARTIES

The petitioners are as follows: Jayne Bray, Michael Bray, Clifford Gannett, Patrick Mahoney, Michael McMonagle, Randall Terry, and Operation Rescue.*

The petitioners were each defendants in the district court and appellants and cross-appellees in the court of appeals. The following were also named as defendants in the district court but were not parties in the court of appeals: Project Rescue, the D.C. Project, and Veterans Campaign for Life.

The respondents are as follows: Alexandria Women's Health Clinic, Commonwealth Women's Clinic, Gynecare Associates, Metro Medical Center, Inc., d/b/a Annandale Women's Center, Nova Women's Medical Center, Planned Parenthood of Metropolitan Washington, DC, Inc., Prince William Women's Clinic, National Organization for Women, Maryland National Organization for Women, Virginia National Organization for Women, and 51st State National Organization for Women.

The respondents were each plaintiffs in the district court and appellees and cross-appellants in the court of appeals. The following were also plaintiffs in the district court and cross-appellants in the court of appeals, but were not appellees in the court of appeals: Capitol Women's Center, Inc., Hillcrest Women's Surgi-Center, and Metropolitan Family Planning Institute. The following was also named as plaintiff in the district court but was not a party in the court of appeals: National Abortion Federation.

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* Pursuant to Rule 29.1, petitioners state that none of the petitioners is a corporation.

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JAYNE BRAY, *et al.*,
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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the district court is reported as *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989). The decision of the court of appeals is reported as *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit in this case was entered on September 19, 1990. This Court has jurisdiction, under 28 U.S.C. § 1254(1), to review the judgment of the court of appeals.

STATUTORY PROVISIONS

42 U.S.C. § 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1988 provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title V of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The underlying action in this case is a suit for declaratory and injunctive relief under federal and state law. Respondents—plaintiffs in the district court—are abortion facilities and organizations advocating a legal right to abortion. Petitioners—defendants in the district court—are six individuals and an organization opposed to abortion.

Respondents alleged that petitioners have engaged in illegal activities, and threaten to continue to do so, in order to stop abortions. There are, however, no allegations that petitioners have violated the injunction which the district court granted in the case at bar.

Respondents have asserted two federal causes of action: first, a conspiracy to violate a right to travel under 42 U.S.C. § 1985(3); and second, a conspiracy to violate a privacy right to abortion, also under § 1985(3). Respondents also asserted three pendent state causes of action: trespass, public nuisance, and tortious interference with business relationships. Federal jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1342.

A. Statement of Facts

As the district court found, all of the petitioners "share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." 726 F. Supp. at 1488 (App. 20a). The district court found that each of the individual defendants acted "through and in concert with Operation Rescue" to organize "rescue" events, *id.*, some of which included trespassing and obstruction of ingress and egress at abortion facilities, *id.* at 1489 (App. 21a).

The term "rescue" can refer to a variety of activities directed toward stopping abortion (i.e., *rescuing* the unborn child from abortion). The term includes not only

physical obstruction of access to abortion facilities, but also a variety of expressive activities protected under the free speech guarantee of the first amendment, such as picketing, distributing literature, and verbally seeking to persuade pregnant women entering abortion facilities to carry their children to term. Under this broad definition of "rescues," respondent Commonwealth Women's Clinic, in Falls Church, Virginia, has, as the district court found, been "on almost a weekly basis the target of 'rescue' demonstrations . . . ." 726 F. Supp. at 1489 (App. 22a).

The term "rescue" also can refer more particularly to efforts physically to block access to an abortion business. *Id.* at 1488 (App. 20a) (citing definition of "rescue" in Operation Rescue literature). In the narrow sense of an actual physical blockade, the district court found that a rescue had occurred, one year prior to the court's order granting an injunction against petitioners, at the Commonwealth Women's Clinic in Virginia. *Id.* at 1489 (App. 22a) (October 29, 1988). The court also found that rescues have occurred at a number of other locations outside of Virginia, *id.* at 1490 (App. 23a), including the Washington Metropolitan area, *id.* (April 1989 rescue in the District of Columbia); *id.* (recent rescues in the District of Columbia and Maryland).

The district court found there to be a "substantial likelihood" of blockades at abortion facilities in the Northern Virginia area "in the immediate future." *Id.* (App. 25a). There was no evidence, however, of "current plans for 'rescue' demonstrations at clinics in the Northern Virginia Area," *id.* (App. 24a), and the court's conclusion about the threat of future blockades rested entirely on an inference from the "established history" of blockades "in the Washington Metropolitan area and elsewhere," *id.* (App. 25a), together with the refusal of petitioners specifically "to report to the Court that 'rescue' demonstrations designed to close clinics would not be carried out against Northern Virginia clinics in the future," *id.*

The district court found that physical obstruction of abortion facilities hinders or prevents abortions from taking place at such facilities. *Id.* at 1489-90 (App. 21a-23a). The court also found that "[s]ubstantial numbers of women" seeking abortion in the Washington Metropolitan Area "travel interstate to reach the clinics." *Id.* at 1489 (App. 22a). In particular, the court found that "approximately twenty (20) to thirty (30) percent" of the patrons of the Commonwealth Women's Clinic in Virginia "come from out of state." *Id.*

The district court did not find, and respondents neither argued nor attempted to prove, that petitioners had any motivation for trying to stop abortions other than sincere opposition to the killing of unborn children. The district court also did not find, and respondents neither argued nor attempted to prove, that the place of residence of women coming to abortion facilities made any difference to petitioners' efforts to stop abortion; that petitioners discriminated in any way between women traveling interstate and women traveling intrastate; or that petitioners interfered with any "travel" other than access to a particular abortion facility. Finally, respondents' counsel conceded before trial that "we are not alleging and don't plan to prove State action, and we stand or fall on that." Trans. of Nov. 16, 1989 hearing (morning session) at 13.

B. Course of Proceedings

At the close of trial, the district court granted a permanent injunction.[1] The district court ruled in favor of

[1] The district court provided that the "permanent" injunction would expire on July 31, 1990, unless the plaintiffs were to show good cause for its extension. 726 F. Supp. at 1498 (App. 41a). The district court subsequently extended the injunction, which is currently set to expire on September 24, 1991. *See National Organi-*

respondents on their first federal claim (conspiracy to violate a right to travel), and on two of their pendent state claims (trespass and public nuisance). The court declined to address respondents' remaining federal claim (conspiracy to violate a right to abortion) and remaining state claim (tortious interference with business relationships). *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493-96 (E.D. Va. 1989) (App. 31a-36a).

The district court acknowledged the requirement, under § 1985(3), that the offending parties act with a "class-based discriminatory animus." 726 F. Supp. at 1492 (App. 28a). The district court held that "gender-based animus" satisfies this requirement. *Id.* The court further held the statute applicable on the facts of this case because "women seeking abortions" are a "subset of a gender-based class," *id.* at 1492-93 (App. 29a). The court recognized a conflict among the federal courts on this issue, *id.*, but found the "majority" view persuasive, *id.*

With respect to the requirement of an independently existing right secured under § 1985(3), the district court relied upon a federal constitutional right to travel. *Id.* at 1493 (App. 30a). The court held that because abortion businesses in Northern Virginia have clients "who travel from out of state," *id.*, blocking access to these businesses "interfere[s] with these person's [sic] right to unimpeded interstate travel," *id.* The court rejected petitioners' argument that such blockades "affect only intra-state travel, from the street to the doors of the clinics." *Id.*

The court also held that this "right to interstate travel is protected from purely private as well as governmental interference," and therefore no showing of state action was necessary. *Id.*

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zation for Women v. Operation Rescue, No. 89-1558-A, slip op. at 2, 5 (E.D. Va. Sept. 21, 1990) (App. 58a, 60a).

The district court declined to reach respondents' claim that petitioners were violating a constitutional right to abortion that is enforceable against purely private action. *Id.* at 1493-94 (App. 32a-33a). Observing that such a claim is "problematic" and "novel," the court held that it would be "unnecessary and imprudent to venture into this thicket." *Id.* at 1494 (App. 32a-33a).

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. Respondents cross-appealed, challenging certain limitations on the scope and duration of the injunction.

The district court subsequently awarded costs and attorneys fees to respondent. *National Organization for Women v. Operation Rescue*, No. 89-1558-A (E.D. Va. Feb. 13, 1990) (App. 43a). Petitioners appealed from this order as well, and the court of appeals consolidated this appeal with the previous appeal and cross-appeal.

The court of appeals affirmed the judgment of the district court in all respects (including denial of respondents' cross-appeal). *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam) (App. 1a).

The court of appeals decided the case solely on the basis of the federal legal issues. *Id.* at 585-86 (App. 8a-9a). The court engaged in no independent analysis of the district court's rulings under § 1985(3). Rather, the court simply noted that the "legal premises under which the district court operated are . . . consistent with the law of the circuits." *Id.* at 585 (App. 8a). Announcing that it was reviewing the injunction under "an abuse of discretion standard," *id.*, the court of appeals held that the district court "operated in conformity with other circuits on the relevant questions of law," *id.* The court rested its disposition of the appeal specifically upon "the federal question raised by appellants [petitioners]," and therefore declined to address the propriety of pendent

jurisdiction over respondents' state claims. *Id.* at 586 (App. 9a). Finally, the court upheld the award of attorneys fees. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The decision of the U.S. Court of Appeals for the Fourth Circuit in the present case is in direct conflict with a decision rendered by the U.S. Court of Appeals for the Fifth Circuit, and in effective conflict with a decision of the en banc U.S. Court of Appeals for the Eighth Circuit. The decision is also in direct conflict with a decision rendered by the U.S. District Court for the Central District of California, an appeal from which is now pending before the U.S. Court of Appeals for the Ninth Circuit.

The Fifth Circuit has twice rejected efforts to characterize anti-abortion activities as violative of 42 U.S.C. § 1985(3). *See Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989).[2] In its most recent decision, the court of appeals held that anti-abortion activities do not satisfy the requirement of an "invidiously discriminatory class-based animus," *see United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 834-35 (1983), which this Court has held to be essential to a valid claim under § 1985(3). The lead opinion by Judge Gee in *Mississippi Women's Medical Clinic* observed that,

[2] In *Roe*, the court of appeals held that plaintiffs' claim of "class-based animus" failed because the asserted class—"persons who do do not share the anti-abortion religious beliefs of the conspirators," 811 F.2d at 932—was defective. *Id.* at 935-37. The *Roe* court observed that this class possessed "[n]o common unity of either religious denomination or faith," *id.* at 936.

even if female patrons of an abortion business were a class, there was no *animus* against that class.

> MWMC maintains . . . that the relevant "class" being discriminated against is that consisting of "women of childbearing age who seek medical attention from the MWMC." Assuming *arguendo* that this grouping constitutes a class, MWMC still has not shown that the protestors acted with an invidious discriminatory *animus* against that particular class. Rather, the record indicates that the protestors (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc. In fact, MWMC's introduction of [a] letter written to a male doctor indicates that the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions. It is useful to reiterate that the legislative history indicates that Congress wanted to evaluate "class-based invidious discrimination" through the lens of "animus or motivation," not impact. *See United Brotherhood of Carpenters Local 610*, 463 U.S. at 834-35. Thus, . . . MWMC in this case has designated a class that is so under-inclusive as to mischaracterize the dispute.

Mississippi Women's Medical Clinic, 866 F.2d at 794. Judge Rubin, concurring in the result, agreed that plaintiffs had "failed to establish the existence of a 'class' against which the animus of the protestors was directed," *id.* at 797.

The decision of the Fourth Circuit in the present case, by contrast, holds that efforts to prevent abortion do satisfy the "class-based animus" requirement of § 1985(3).

The Eighth Circuit, in *Lewis v. Pearson Foundation, Inc.*, No. 88-1293 (8th Cir. Oct. 24, 1990) (en banc), affirmed, by an equally divided court, a district court decision rejecting a § 1985(3) claim against a pro-life crisis pregnancy center. *See also* 908 F.2d 318 (8th Cir. 1990) (origi-

nal panel decision reversing district court), *vacated*, No. 88-1293 (8th Cir. Sept. 7, 1990) (en banc). The plaintiff in *Lewis* had alleged an invidiously discriminatory animus against the class of "women seeking abortions." *See* 908 F.2d at 325. The district court had dismissed the complaint, finding a lack of animus and an improper class. *Id.* at 321. Citing the Fifth Circuit decision in *Roe v. Abortion Abolition Society*, the district court had held that because the "defendants acted out of moral-religious beliefs"—i.e., opposition to abortion—the complaint in *Lewis* "failed to establish the class-based discriminatory animus against which section 1985(3) was intended to protect." 908 F.2d at 321. The district court had also rejected the purported class—women seeking abortion—holding that this class "did not possess a unifying common characteristic distinguishing it from the remainder of the population." *Id.* The Eighth Circuit, upon rehearing the case en banc, affirmed the judgment of the district court by an equally divided court.[3] No. 88-1293 (8th Cir. Oct. 24, 1990) (en banc).

The decision of the Fourth Circuit in the present case, by contrast, holds that "women seeking abortion" form a valid class under § 1985(3) and that a desire to prevent women from obtaining abortions, without more, is equivalent to an invidiously discriminatory class animus.

The Central District of California has squarely rejected a § 1985(3) claim indistinguishable from the case at bar. In *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), the district court held that the class of "women seeking abortion" does not satisfy the requirements of § 1985(3). 721 F. Supp. at 1171.

> The Court disagrees with the proposition that any "particular subclass of women," . . . is a protected class. For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender. The inquiry, thus, must be made without respect to gender, *i.e.*, it is the "seeking abortion" trait which animates the defendants' actions and must be the basis for making the § 1985(3) analysis.
>
> Such a class does not stand up to close analysis . . . . Although women, under certain circumstances, still have a constitutional right to seek an abortion, the courts have never designated "abortion seekers" as a class requiring special protection or subject to exacting scrutiny. And certainly Congress has never so indicated in legislation. The Supreme Court's recent summary of its abortion decisions since *Roe v. Wade*, 410 U.S. 113 (1973), cannot be read as suggesting that women seeking abortions is a suspect class subject to exacting scrutiny. *See Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040, 3051-52 (1989). The Court holds that women seeking abortions is not a class intended to be protected by the Ku Klux Klan Act.

721 F. Supp. at 1171-72 (citation, brackets, and footnote omitted). The district court subsequently dismissed the plaintiffs' amended complaint. *National Abortion Federation v. Operation Rescue*, No. CV 89-1181 AWT (C.D. Cal. Jan. 31, 1990), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990). Adhering to its previous ruling, the court explicitly rejected the reasoning of the Second Circuit in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), which held that efforts to prevent abortion "reveal an attitude or animus based on gender," *NY State NOW*, 886 F.2d at 1359. Refusing to follow the Second Circuit, the district court in *National Abortion Federa-*

[3] It should be noted that a senior judge participated in the en banc rehearing and voted to reverse. Thus, among active members of the Eighth Circuit, the vote was 5-4 in favor of affirmance.

tion declared itself "unable to make the leap from 'women seeking abortion' to 'women' . . . ." Slip. op. at 5.

The decision of the Fourth Circuit in the present case, by contrast, holds "women seeking abortion" to be a proper class under § 1985(3), and equates opposition to abortion with gender-based discrimination.

The plain conflict between the Fourth Circuit and the Fifth and Eighth Circuits (and the Central District of California) is only aggravated by the decisions of the Second Circuit and various district courts sustaining, with the Fourth Circuit, a cause of action under § 1985 (3) against private parties, like petitioners, who engage in activities designed to prevent abortion. *See infra* note 4. The appeals on this issue now pending in the Sixth and Ninth Circuits, *see id.*, cannot possibly resolve this conflict, and can only contribute to the division of the circuits.

In order to resolve this conflict in the circuits, therefore, this Court ought to grant review in the case at bar.

II. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND UNSETTLED.

The national controversy over the issue of human abortion has given rise to a multitude of local conflicts between opponents and providers of abortion. Opponents of abortion have employed a variety of strategies to discourage or prevent abortions. Abortion facilities have countered with a variety of lawsuits featuring various state and federal causes of action.

The present case involves the use of 42 U.S.C. § 1985 (3), the civil rights conspiracy law, as a means of invoking federal jurisdiction and obtaining relief against private persons who obstruct or threaten to obstruct access to abortion businesses.

A. Practical Importance

The questions presented by the application of § 1985 (3) to anti-abortion activists are of great practical importance to the federal judiciary. Cases alleging a cause of action under this statute, in the specific context of anti-abortion activities, have arisen in at least nine of the twelve federal geographical circuits.[4] Most of these cases are still pending.

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[4] As of December 17, 1990 petitioners are aware of the following cases:

D.C. Circuit—*National Organization for Women v. Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989), later decision, No. 89-2968-LFO (D.D.C. July 31, 1990).

1st Circuit—no known cases.

2d Circuit—*New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989); *Upper Hudson Planned Parenthood, Inc. v. Doe*, No. 90-CV-1084 (N.D.N.Y. filed Oct. 5, 1990).

3d Circuit—*Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989).

4th Circuit—*National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam); *National Organization for Women v. Operation Rescue*, No. 89-3038 (D. Md. Nov. 15, 1990).

5th Circuit—*Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989).

6th Circuit—*Volunteer Medical Clinic, Inc. v. Operation Rescue*, No. Civ. 3-89-156 (E.D. Tenn. May 19, 1989), *appeal docketed*, No. 90-5159 (6th Cir. Jan. 30, 1990).

7th Circuit—*Fort Wayne Women's Health Organization v. Brane*, Civ. No. F90-066 (N.D. Ind. May 8, 1990).

8th Circuit—*Lewis v. Pearson Foundation, Inc.*, No. 87-894 C (2) (E.D. Mo. Jan. 15, 1988), *aff'd by an equally divided court*, No. 88-1293 (8th Cir. Oct. 24, 1990) (en banc); *Carhart v. Doolan*, No. CV 90-0-540 (D. Neb. filed Aug. 7, 1990).

9th Circuit—*Chico Feminist Women's Health Center v. Butte Glen Medical Society*, 557 F. Supp. 1190 (E.D. Cal. 1983); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F. Supp. 165 (D. Ore. 1988); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), *amended*

The proper disposition of these lawsuits, as well as the threshold jurisdictional question whether they belong in federal court at all, depends upon the validity of respondents' asserted cause of action under § 1985(3).

B. Intrinsic Importance

The questions presented by the application of § 1985(3) to anti-abortion activists are of great inherent legal significance as well.

This Court has clearly identified several basic elements of a claim under § 1985(3). *See United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckinridge*, 403 U.S. 88 (1971).[5] Two crucial tests for a § 1985(3) claim are especially relevant to the present case. First, plaintiffs must allege and prove an "invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S.

complaint dismissed, No. CV 89-1181 (C.D. Cal. Jan. 31, 1990), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990); *Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989).

10th Circuit—no known cases.

11th Circuit—no known cases.

With the exception of the *Lewis* case in the Eighth Circuit, each of these cases involves a suit seeking relief against anti-abortion picketing or obstruction at abortion facilities. *Lewis* was an unsuccessful suit by a woman who alleged that a pro-life crisis pregnancy center wrongfully hindered her efforts to obtain an abortion.

[5] This Court has held that

> to make out a violation of § 1985(3), . . . the plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Scott, 463 U.S. at 828-29.

at 102 (footnote omitted); *Scott*, 463 U.S. at 834-35. Second, plaintiffs must identify some independently existing right or rights which defendants allegedly have violated or threaten to violate. *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979); *Scott*, 463 U.S. at 833.

1. *Class animus*

The first crucial question presented in this case is whether anti-abortion activities *per se* manifest a discriminatory class-based animus that is cognizable under § 1985(3).

The decision of the court of appeals in the case at bar rests upon two basic premises: first, that "women" or "women seeking abortion" are a proper class under § 1985(3), and second, that anti-abortion activities *per se* manifest a discriminatory animus against women. Each of these premises presents a substantial and unsettled question of federal law.

a. *Presence of a cognizable class*

This Court has held that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. at 836. In *Scott*, the Court "withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." 463 U.S. at 837.

Lower federal courts have nevertheless proceeded to hold, in the present case and elsewhere, that women are a class protected under § 1985(3).[6] A number of courts

[6] *E.g.*, *New York State NOW v. Terry*, 886 F.2d 1339, 1358-59 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235,

have held in particular that "women seeking abortions" are valid class under § 1985(3).[7] Other courts have held to the contrary.[8]

This Court has not yet settled the question whether § 1985(3) applies to sex discrimination. But even if women are a class protected under § 1985(3), an additional question remains: whether "women seeking abortion" form a valid class. As one district court held,

> if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender.

National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990). Description of the class as "women seeking abortion" cannot, by mere verbal legerdemain, convert opposition to abortion into sex discrimination.

b. *Presence of discriminatory animus*

The court of appeals in the case at bar made unjustifiable logical leap when it held that petitioners' opposition to abortion is the legal equivalent of discrimination against women.

Petitioners' true motivation is obvious: the desire to discourage or prevent abortions. Respondents have never attempted to prove that any of the petitioners harbored the least bit of hostility toward women. In fact, one of the petitioners *is* a woman; furthermore, it is common knowledge that countless women are involved in anti-abortion activities, including efforts to block access to abortion facilities.

The decision of the court of appeals in the present case, therefore, as well as the decisions of other courts that have applied § 1985(3) to anti-abortion activities, must rest on the premise that opposition to abortion is *per se* the legal equivalent of opposition to women. While this may be the sincere belief of some proponents of legalized abortion, it is by no means a self-evident legal proposition. On the contrary, such a charge of sex discrimination represents an affront to the sincerity of countless men *and* women—including judges, legislators, scholars, and a multitude of others—who regard human abortion as the killing of innocent persons.

Petitioners tried to stop women from having abortions, not because these women are *women*, but because peti-

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1241-44 (3d Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366 (1979). *But cf. Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176-77 (10th Cir. 1983) (strongly suggesting that the reach of § 1985(3) is limited to racially motivated conspiracies), *cert. denied*, 465 U.S. 1103 (1984), quoted with approval in *Brown v. Reardon*, 770 F.2d 896, 907 (10th Cir. 1985). The Seventh Circuit is in internal conflict on this question. *Compare Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985) (strongly suggesting that the reach of § 1985(3) is limited to racially motivated conspiracies), *with Volk v. Coler*, 814 F.2d 1422, 1434 (7th Cir. 1988) (§ 1985(3) applies to sex discrimination), *with Stevens v. Tillman*, 855 F.2d 394, 404 (7th Cir. 1988) (whether § 1985(3) applies beyond racially motivated conspiracies is an open question), *cert. denied*, 109 S. Ct. 1339 (1989).

[7] *E.g., Cousins v. Terry*, 721 F. Supp. 426, 430 (N.D.N.Y. 1989); *Roe v. Operation Rescue*, 710 F. Supp. 577, 581 (E.D. Pa. 1989); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F. Supp. 165, 169 (D. Ore. 1988).

[8] *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1171-72 (C.D. Cal. 1989), *amended complaint dismissed*, No. CV 89-1181 (C.D. Cal. Jan. 31, 1990), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990); *Lewis v. Pearson Foundation, Inc.*, No. 87-894 C (2), slip op. at 7-10 (E.D. Mo. Jan. 15, 1988), *aff'd by an equally divided court*, No. 88-1293 (8th Cir. Oct. 24, 1990) (en banc).

tioners believe that *abortion* is an atrocity. As in *Mississipi Women's Medical Clinic*, the

> protestors (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc. In fact, [the record] indicates that the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions. It is useful to reiterate that the legislative history indicates that Congress wanted to evaluate "class-based invidious discrimination" through the lens of "animus or motivation," not impact.

866 F.2d at 794 (opinion of Gee, J.) (emphasis in original) (citing *Scott*, 463 U.S. at 834-35). Thus, petitioners did not act with "a class-based animus, that is a prejudice against a group of persons or against a particular person *because of his membership in that group.*" *Roe v. Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir.) (emphasis added), *cert. denied*, 484 U.S. 848 (1987). *See* 726 F. Supp. at 1488 (App. 20a) (quoting affidavit of petitioner Terry).

In view of the growing number of lower court cases treating opposition to abortion as the *per se* equivalent of discrimination against women under § 1985(3), *see supra* note 4, this Court should grant review to settle this issue.

2. *Right to travel*

The decision of the court of appeals in the present case rests upon the premise that private parties violate a federal constitutional right to travel when they block access to an establishment that serves at least some people who come from out of state. *See* 914 F.2d at 585 (App. 8a); *see also* 726 F. Supp. at 1493 (App. 29a-30a).

The implications of this holding are astonishing. Virtually every business located in a city situated near a state border (e.g., New York, Philadelphia, Washington, D.C., Chicago, Cincinnati, Minneapolis, St. Louis, and so

forth), as well as every business located on a major interstate route or in the vicinity of a tourist site or commercial center, will serve out-of-state customers on a regular basis. According to the holding of the court below, any sit-in or mass picketing at such a business would be a federal constitutional violation.

This Court has never recognized such an all-encompassing right to travel.

True, this Court has held that there is a "constitutional right to travel from one State to another," *United States v. Guest*, 383 U.S. 745, 757 (1966); the Court has further held that this right applies against private as well as government interference, *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

The right to travel, however, is not an unlimited right to mere physical movement. Rather, it is a "right of free *interstate migration*," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality opinion) (emphasis added), or, as Justice O'Connor would characterize it, a right to freedom from impermissibly burdensome discrimination between state residents, *id.* at 920 (O'Connor, J., dissenting). There is no general federal constitutional tort of obstruction of public or private passage.

The right to interstate travel guarantees *equal* freedom to travel as between interstate and intrastate travelers. If the obstacle in question applies to *both* interstate and intrastate travelers, the right to interstate travel is not implicated.

> Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive.

Dunn v. Blumstein, 405 U.S. 330, 342 n.12 (1972) (citation omitted; emphasis in original). Thus, in *Dunn* this Court struck down a one-year residency requirement for voting which "penalized those persons, *and only those persons*, who have gone from one jurisdiction to another during the qualifying time period." *Id.* at 338 (emphasis added).[9] But in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), by contrast, this Court sustained a single-family zoning restriction which was "not *aimed* at transients." *Id.* at 7 (emphasis added).

Petitioners' alleged obstruction of access to abortion businesses simply does not implicate the federal constitutional right to travel under any traditional understanding of that right. Such obstruction hinders all comers, whether from Virginia or from out-of-state. Respondents did not establish, and could not establish, that anti-abortion rescues block border passage, single out interstate travelers, or penalize out-of-state patrons because of their residence.[10] *Cf. Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902, 903 (1986) (plurality opinion) (right to "interstate migration" implicated by action that "actually deters," has the "primary objective" of deterring, or uses a "classification which serves to penalize" *interstate* migration).

Notwithstanding the absence of favorable precedent on the issue in this Court, the court of appeals in the case at

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[9] The residency restriction at issue in *Doe v. Bolton*, 410 U.S. 179 (1973), forbade abortions for nonresidents of Georgia while allowing them for residents. *Id.* at 202. This restriction therefore effectuated *discrimination* against out-of-state patrons of abortion facilities, *id.* at 200, and this Court held that the law violated the Privileges and Immunities Clause of the Constitution, U.S. Const. art. IV, § 2, *see* 410 U.S. at 200.

[10] In fact, an *intrastate* traveler from the far end of Virginia will obviously face greater inconvenience from an anti-abortion blockade in Alexandria than will an *interstate* traveler who resides just minutes away in the District of Columbia.

bar held that respondents had made out a valid claim of violation of their members' and clients' right to travel. Nor is this ruling an isolated aberration. In a number of similar cases in other jurisdictions, federal courts have found the right to travel implicated by the prevention or hindrance of entry into an abortion business.[11]

Nor is this expansion of the federal constitutional right to travel confined to cases involving abortion protests. In *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990) (sustaining "anti-cruising" ordinance), the Third Circuit explicitly recognized a right of *intrastate* travel. And in *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990) (sustaining a § 1985(3) claim for racially motivated violence), the Second Circuit held that this newly discovered right to intrastate travel applies against purely private actors.

While past decisions of this Court provide no warrant for this major expansion of the right to travel, no decision of this Court clearly forecloses this expansion. This Court should therefore grant review in the present case in order to settle this important question of federal law.

3. *Federal jurisdiction*

Petitioners believe that the § 1985(3) claims of respondents are so patently insubstantial as to be insufficient to confer subject matter jurisdiction upon a federal court. *Hagans v. Lavine*, 415 U.S. 528, 537-38 (1974).

The jurisdictional issue is of great importance because of the frequency with which § 1985(3) claims are employed as the basis for obtaining federal court adjudication over what are essentially trespass suits. *See* No. 89-1558-A, slip op. at 5, (E.D. Va. Feb. 13, 1990) (App. 46a-47a) (ruling of district court on attorney's fees)

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[11] *E.g., New York State NOW v. Terry*, 886 F.2d 1339, 1360-61 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F. Supp. 165, 168 (D. Ore. 1988).

(present case "was, essentially, a simple trespass case only modestly complicated by an unsettled § 1985(3) issue").

The Second Circuit recently dismissed, for lack of subject matter jurisdiction, a hopelessly attenuated claim against anti-abortion activists under the federal RICO statute. *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990). The exceedingly strained § 1985 (3) claim of respondents merits the same treatment. Until this Court settles the issue, however, abortion providers will remain free to clog the federal courts with injunction and damage actions against anti-abortion activists.

C. Precedential Importance

The questions presented by the application of § 1985(3) to anti-abortion activists are of importance as well for the precedents they set for other social controversies. The decision of the court below binds only the petitioners. The principles the court embraced, however, set the standards for all future public protest.

If the alleged sit-ins of petitioners violate the federal constitutional right to travel, for example, then so did the lunch-counter and college campus sit-ins of the 1960's and 1970's, and so will the sit-ins of the 1990's and 2000's—whatever the particular social cause may be.

The definitions of "class" and "animus" employed in these cases will similarly affect future decisions in areas as diverse as campaigns against pornography, anti-nuclear protests, "animal rights" demonstrations, and anti-smoking initiatives.

In short, the jurisprudence established in these cases cannot be confined to the context of abortion protests. Careful application of the correct legal principles is important not only for petitioners, but for the participants in the social struggles of the future.

III. THE QUESTIONS PRESENTED ARE SHARPLY DEFINED AND NECESSARY TO THE RESOLUTION OF THIS CASE.

Finally, the petition for certiorari presents sharply defined federal legal issues, resolution of which is necessary to the final disposition of the present case. No adequate, independent state grounds support the judgment of the court of appeals.

First of all, the court of appeals addressed only the federal issues in the case. 914 F.2d at 585-86 (App. 8a-9a). Affirming the district court on federal grounds, the court of appeals did not discuss the merits of respondents' pendent state claims. *Id.* at 586 (App. 9a). Moreover, the court explicitly declined to reach petitioners' objection to the exercise of pendent jurisdiction over these claims. *Id.* Hence, the propriety of the exercise of pendent jurisdiction in the district court is not before this Court. Were this Court to reverse the judgment of the court of appeals, that court would then need to determine, on remand, whether pendent jurisdiction would be appropriate in light of the absence of any federal cause of action. At that point, dismissal of the state claims, without prejudice, could be in order. *See United Mine Workers v. Gibbs*, 383 U.S. 727 (1966).[12]

Second, resolution of the threshold question of federal subject matter jurisdiction (question number four of the present petition for certiorari) in favor of petitioners

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[12] The possibility that the court of appeals might ultimately reaffirm its original judgment on alternative grounds, not yet decided by that court, does not prevent review in this Court. *E.g.*, *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 486 n.3, 489-90 & n.5 (1986) (reversing the judgment of the Washington Supreme Court and remanding for consideration of additional arguments of respondents); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 811-13 (1985) (reversing the judgment of the court of appeals and remanding for consideration of additional arguments of respondents).

would necessitate reversal of the judgments of the lower courts and dismissal of all claims against petitioners. There can be no adequate alternative state grounds for upholding a decision rendered in the absence of subject matter jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 536-37, 543 (1974).

Third, resolution, in favor of petitioners, of the federal questions presented, would require reversal of the award of attorney's fees against petitioners. The courts of appeals, including the Fourth Circuit, are uniform in holding that where a plaintiff loses on a federal fee-generating claim, even while winning on a pendent state claim, no award of attorney's fees is available under 42 U.S.C. § 1988. *Bunting v. City of Columbia*, 639 F.2d 1090, 1095 (4th Cir. 1981); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980); *McDonald v. Doe*, 748 F.2d 1055, 1056-57 (5th Cir. 1984) ("This circuit . . . has recently held that the plaintiff does not . . . prevail for fee purposes under 42 U.S.C. § 1988 when his constitutional claim is decided adversely to him even though he obtains recovery on a pendent state law claim, joining the other circuits that have considered the question and have unanimously reached the same conclusion") (footnotes and citations omitted) (and cases cited), *reh'g denied*, 753 F.2d 1075 (5th Cir. 1985); *Raley v. Fraser*, 747 F.2d 287, 290-92 (5th Cir. 1984); *Reel v. Arkansas Dep't of Correction*, 672 F.2d 693, 697-99 (8th Cir. 1982); *Curia Brothers & Co. v. Allen*, 672 F.2d 347, 357-58 (3d Cir. 1982); *Russo v. State of New York*, 672 F.2d 1014, 1022-23 (2d Cir. 1982).

The judgment of the court of appeals, in short, rests entirely and necessarily upon that court's resolution, in a manner adverse to petitioners, of the questions presented in the petition for certiorari.

CONCLUSION

For all of the foregoing reasons, therefore, this Court should grant the petition for certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case at bar.

Respectfully submitted,

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December 18, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2606

NATIONAL ORGANIZATION FOR WOMEN; 51ST STATE NATIONAL ORGANIZATION FOR WOMEN; MARYLAND NATIONAL ORGANIZATION FOR WOMEN; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, DC, INC.; COMMONWEALTH WOMEN'S CLINIC; NOVA WOMEN'S MEDICAL CENTER; PRINCE WILLIAM WOMEN'S CLINIC; GYNECARE ASSOCIATES; METRO MEDICAL CENTER, INC., d/b/a ANNANDALE WOMEN'S CENTER; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; ALEXANDRIA WOMEN'S HEALTH CLINIC,

Plaintiffs-Appellees,

and

NATIONAL ABORTION FEDERATION; CAPITOL WOMEN'S CENTER, INC.; HILLCREST WOMEN'S SURGI-CENTER; METROPOLITAN FAMILY PLANNING INSTITUTE,

Plaintiffs,

versus

OPERATION RESCUE; RANDALL TERRY; PATRICK MAHONEY; CLIFFORD GANNETT; MICHAEL MCMONAGLE; MICHAEL BRAY; JAYNE BRAY,

Defendants-Appellants,

and

PROJECT RESCUE; THE D.C. PROJECT; VETERANS CAMPAIGN FOR LIFE,

Defendants.

No. 90-2607

NATIONAL ORGANIZATION FOR WOMEN; 51ST STATE NATIONAL ORGANIZATION FOR WOMEN; MARYLAND NATIONAL ORGANIZATION FOR WOMEN; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, DC, INC.; COMMONWEALTH WOMEN'S CLINIC; CAPITOL WOMEN'S CENTER, INC.; NOVA WOMEN'S MEDICAL CENTER; PRINCE WILLIAM WOMEN'S CLINIC; GYNECARE ASSOCIATES; METRO MEDICAL CENTER, INC., d/b/a ANNANDALE WOMEN'S CENTER; HILLCREST WOMEN'S SURGI-CENTER; METROPOLITAN FAMILY PLANNING INSTITUTE; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; ALEXANDRIA WOMEN'S HEALTH CLINIC,

Plaintiffs-Appellants,

and

NATIONAL ABORTION FEDERATION,

Plaintiff,

versus

OPERATION RESCUE; RANDALL TERRY; PATRICK MAHONEY; CLIFFORD GANNETT; MICHAEL MCMONAGLE; MICHAEL BRAY; JAYNE BRAY,

Defendants-Appellees,

and

PROJECT RESCUE; THE D.C. PROJECT; VETERANS CAMPAIGN FOR LIFE,

Defendants.

No. 90-2651

NATIONAL ORGANIZATION FOR WOMEN; 51ST STATE NATIONAL ORGANIZATION FOR WOMEN; MARYLAND NATIONAL ORGANIZATION FOR WOMEN; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, DC, INC.; COMMONWEALTH WOMEN'S CLINIC; NOVA WOMEN'S MEDICAL CENTER; PRINCE WILLIAM WOMEN'S CLINIC; GYNECARE ASSOCIATES; METRO MEDICAL CENTER, INC., d/b/a ANNANDALE WOMEN'S CENTER; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; ALEXANDRIA WOMEN'S HEALTH CLINIC,

Plaintiffs-Appellees,

and

NATIONAL ABORTION FEDERATION; CAPITOL WOMEN'S CENTER, INC.; HILLCREST WOMEN'S SURGI-CENTER; METROPOLITAN FAMILY PLANNING INSTITUTE,

Plaintiffs,

versus

OPERATION RESCUE; RANDALL TERRY; PATRICK MAHONEY; CLIFFORD GANNETT; MICHAEL MCMONAGLE; MICHAEL BRAY; JAYNE BRAY,

Defendants-Appellants,

and

PROJECT RESCUE; THE D.C. PROJECT; VETERANS CAMPAIGN FOR LIFE,

Defendants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T.S. Ellis, III, District Judge. (CA-89-1558-A)

Argued: July 18, 1990 Decided: September 19, 1990

Before CHAPMAN and WILKINSON, Circuit Judges, and J. F. ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published per curiam opinion.

ARGUED: Jay Alan Sekulow, CHRISTIAN ADVOCATES SERVING EVANGELISM, Washington, D.C., for Appellants. John H. Schafer, COVINGTON & BURLING, Washington, D.C., for Appellees. ON BRIEF: Douglas W. Davis, James M. Henderson, Sr., CHRISTIAN ADVOCATES SERVING EVANGELISM, Washington, D.C.; Thomas Patrick Monaghan, C. Peter Thomas S. Cornell, Walter M. Weber, FREE SPEECH ADVOCATES, New Hope, Kentucky, for Appellants. Laurence J. Eisenstein, Richard H. Seamon, Pamela S. Passman, COVINGTON & BURLING, Washington, D.C.; Sarah E. Burns, Alison Wetherfield, NOW LEGAL DEFENSE AND EDUCATION FUND, Washington, D.C., for Appellees.

PER CURIAM:

This is an appeal of a permanent injunction entered against six individuals and Operation Rescue, an unin-

corporated association whose members oppose abortion and its legalization. The district court enjoined them, *inter alia*, from "trespassing on, blockading, impeding or obstructing access to or egress from" the premises of plaintiffs, facilities that provide abortions or abortion counseling. The court held that defendants' blockading of abortion facilities infringed the right to travel of women seeking to obtain abortions at clinics in the Washington metropolitan area, in violation of 42 U.S.C. § 1985(3), and certain of their rights under state law. *Nat'l Org. For Women (NOW) v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989). Operation Rescue and the six individual defendants appeal. NOW cross-appeals, along with nine abortion facilities and four other organizational plaintiffs. We reject both appeals and affirm the judgment of the district court.

I.

Plaintiffs are nine clinics in the Washington metropolitan area and Northern Virginia that provide various abortion-related services, and five organizations that seek to preserve a woman's right to obtain an abortion. Defendant Operation Rescue is an organization whose purpose is to prevent abortions and to oppose their legalization. One of the ways Operation Rescue seeks to effectuate these goals is to stage "rescue" demonstrations at abortion facilities. At these demonstrations, the participants "intentionally trespass on the clinic's premises for the purpose of blockading the clinic's entrances and exits, thereby effectively closing the clinic" and " 'rescu[ing]' . . . fetuses scheduled for abortion." 726 F. Supp. at 1487. The individual defendants are persons who oppose abortion and its legalization, and who seek to advance their views in part by "planning, organizing and participating in 'rescue' demonstrations under the banner and auspices of Operation Rescue." *Id.* at 1488.

On November 8, 1989, plaintiffs filed a motion for a temporary restraining order in United States District

Court for the Eastern District of Virginia, seeking to enjoin defendants from, among other things, physically impeding access to certain facilities that offer abortion and related services. The impetus for this action was defendants' alleged plans for meetings, rallies, and "rescue" demonstrations on November 10-12 and 18-20, 1989 in the Washington metropolitan area. No rescue activities took place in Northern Virginia during that period. However, clinics in Maryland and the District of Columbia were closed due to demonstrations on those dates.

The district court granted plaintiffs' motion for a temporary restraining order after an expedited hearing on November 8-9, 1989. The trial of the action on the merits and the hearing on the application for a preliminary injunction were consolidated and scheduled to be heard on November 16, 1989. After a two day trial in which plaintiffs presented testimony from nine witnesses and defendants elected to present no evidence, the district court granted the request for a permanent injunction. The court enjoined defendants from "trespassing on, blockading, impeding or obstructing access to or egress from the [listed] premises." *Id.* at 1497. The court refused on First Amendment grounds to extend the injunction to enjoin rescue activities that tend to "intimidate, harass or disturb patients or potential patients." *Id.*

The district court concluded that defendants' activities operated to deny to women seeking abortions and abortion-related services the right to travel interstate in search of medical services in violation of 42 U.S.C. § 1985(3). The court noted that the elements of cause of action under § 1985(3) are:

> "(i) conspiracy; (ii) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (iii) an act in furtherance of the conspiracy; (iv) whereby

> a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States."

Id. at 1492 (*quoting Griffiin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)). The court held that defendants had violated § 1985(3) by entering into a conspiracy to deprive women, whom it found to be a protected class within the meaning of § 1985(3), of their constitutional right to travel. It reasoned, citing *Doe v. Bolton*, 410 U.S. 179 (1973), that the rescue demonstrations interfere with the right to travel because substantial numbers of women seeking the services of clinics in the Washington metropolitan area travel interstate to obtain these services.

The court further found that permanent injunctive relief was appropriate because: (i) there was no adequate remedy at law; (ii) the balance of equities favored plaintiffs; and (iii) the public interest was served by granting the injunction. The court found that women seeking abortions and counseling were likely to suffer irreparable physical and emotional harm as a result of defendants' blockading of abortion facilities. The court noted, for example, that some women require insertion of a pre-abortion laminaria to achieve cervical dilation. Women prevented from entering the clinics for timely removal of this device may risk bleeding, infection, or other possible serious complications, or may be forced to seek services elsewhere. Similarly, the court referenced testimony to the effect that preventing access to abortion clinics could cause clients to experience stress, anxiety, and mental harm. 726 F. Supp. at 1489. The court concluded that since plaintiffs' actions were lawful, although morally objectionable to defendants, the balance of equities weighed in favor of guaranteeing the public protection of the constitutional right to travel.

Operation Rescue now appeals, and the National Organization for Women cross-appeals the district court's refusal to extend the scope of the injunction.

II.

We have reviewed the record and the reasoning of the district court in granting the injunction. We affirm the judgment because the district court found that the activities of appellants in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law. *See* 726 F. Supp. at 1489, 1492-93. The legal premises under which the district court operated are also consistent with the law of the circuits. The court's holding that gender-based animus satisfies the "purpose" element of § 1985(3) has been forecast by this circuit in *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985) (animus against classes defined by "race, national origin and sex" meet requirement of class-based animus within meaning of 1985(3)). At least six circuits have so held. *See New York Nat'l Org. for Women (NOW) v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990); *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984); *Novotny v. Great Am. Fed. Savings & Loan Ass'n*, 584 F.2d 1235, 1244 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979); *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978). *But cf. Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989). The Second Circuit has held under similar facts that blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel. *See New York NOW*, 886 F.2d at 1360-61.

Moreover, we review the entry, scope, and duration of an injunction under an abuse of discretion standard. *See Prendergast v. New York Tel. Co.*, 262 U.S. 43, 50-51 (1923). We find that the district court operated in conformity with other circuits on the relevant questions of law, and we are unable to conclude that the court abused

its discretion in entering an injunction of this scope and duration against the respective parties. Specifically, we reject the argument of Operation Rescue that there was insufficient evidence to grant relief against defendants Bray, McMonagle and Gannett. We also reject NOW's contention that the district court abused its discretion in limiting the injunction to Northern Virginia and in declining to extend the injunction indefinitely. In addition, we affirm the district court's refusal to broaden the scope of the injunction to include activities that tend to "intimidate, harass or disturb patients or potential patients" because to do so would risk enjoining activities clearly protected by the First Amendment. In addition to the actions enjoined by the district court, the members of Operation Rescue also sought, through verbal means, to persuade women not to seek the services of abortion clinics and to "impress upon members of society" the moral rightness and intensity of their opposition to abortion. 726 F. Supp. at 1488. The district court was within its discretion in declining to extend the injunction in a manner that would interfere with such expressive activity. In view of our disposition of the federal question raised by appellants we also decline to disturb the district court's refusal to dismiss the state law claims, and we uphold as well its award of costs and attorneys fees. The district court did not, and we do not, reach the question of whether § 1985(3) can encompass violations of a right to privacy.

Accordingly, the judgment of the district court is affirmed in all respects for the reasons stated in its opinion.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 89-1558-A

NATIONAL ORGANIZATION FOR WOMEN, 51st STATE NATIONAL ORGANIZATION FOR WOMEN, MARYLAND NATIONAL ORGANIZATION FOR WOMEN, VIRGINIA NATIONAL ORGANIZATION FOR WOMEN, PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, D.C., Inc., COMMONWEALTH WOMEN'S CLINIC, NOVA WOMEN'S MEDICAL CENTER, ALEXANDRIA WOMEN'S HEALTH CLINIC, PRINCE WILLIAM WOMEN'S CLINIC, GYNECARE ASSOCIATES, METRO MEDICAL CENTER, Inc. d/b/a ANNANDALE WOMEN'S CENTER, CAPITOL WOMEN'S CENTER, INC., HILLCREST WOMEN'S SURGI-CENTER, and METROPOLITAN FAMILY PLANNING INSTITUTE,

Plaintiffs,

v.

OPERATION RESCUE, RANDALL TERRY, PATRICK MAHONEY, CLIFFORD GANNETT, MICHAEL MCMONAGLE, MICHAEL BRAY, JANE BRAY,

Defendants.

PERMANENT INJUNCTION

[Filed Nov. 22, 1989]

This matter came before the Court for a hearing on the merits.[1] Pursuant to Rule 65(a)(2), Fed. R. Civ. P.,

[1] The Court earlier granted plaintiffs' motion for a Temporary Restraining Order ("TRO"). This Permanent Injunction supersedes that Order.

and with the parties' consent, the merits hearing was accelerated and consolidated with the hearing for a preliminary injunction. At the conclusion of the hearing, the Court, pursuant to Rule 52, Fed. R. Civ. P., stated its findings of fact and conclusions of law from the bench. The Court will also issue Findings of Fact and Conclusions of Law in written, amplified form. Based on the findings and conclusions issued from the bench and on the forthcoming written Findings of Fact and Conclusions of Law, the Court ADJUDGES, ORDERS and DECREES that:

(1) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from the following premises: Alexandria Women's Health Center, 101 South Whiting Street, Alexandria, Virginia; Commonwealth Women's Clinic, 916 West Broad Street, Falls Church, Virginia; Gynecare Associates, 312 South Washington Street, Alexandria, Virginia; Metro Medical Center, Inc. d/b/a Annandale Women's Center, 2871 Duke Street, Alexandria, Virginia; NOVA Women's Medical Center, 990 Main Street, Suite 305, Fairfax, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 5622 Columbia Pike, Suite 303, Falls Church, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 10875 Main Street, Suite 208, Fairfax, Virginia; Prince William Women's Clinic, 9384-C Forestwood Lane, Manassas, Virginia.

(2) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice

of this Permanent Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from any facility at which abortions, family planning or gynecological services are provided in Arlington County, Fairfax County, City of Fairfax, City of Falls Church, Loudoun County, Prince William County or the City of Alexandria.

(3) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert with it are directed to inform all persons who assemble to participate in a "rescue" operation [2] or similar event in concert with the defendants in the localities listed above in paragraph 2, of this Permanent Injunction and its terms. In the event of a "rescue" operation or similar event within the area covered by this permanent injunction, defendants are directed to file with the Court and serve upon the counsel for plaintiffs an affidavit establishing compliance with this paragraph and describing with particularity the means by which compliance was achieved. This affidavit is to be filed and served within three (3) days of the "rescue" operation or similar event.

(4) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys or any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction by personal service or otherwise and who violate the provisions of this Permanent Injunction and are held in contempt of court, may be imprisoned and fined $1,500. The Court may impose greater or lesser fines in the event of aggravating, mitigating or extenuating circumstances.

(5) This Permanent Injunction terminates at 5:00 p.m., July 31, 1990 but may be extended for good cause shown.

(6) Plaintiffs are directed to deliver a copy of this Permanent Injunction to all of the police departments in each of the localities listed in paragraph 2.

Nothing in this Permanent Injunction should be construed to limit defendants' free exercise of their First Amendment rights. More specifically, nothing in this Permanent Injunction limits defendants' First Amendment right to express their views on abortion publicly and in a proper manner in the vicinity of any facility. But defendants may not use the First Amendment as an excuse to violate plaintiffs' rights.

The Clerk is directed to issue copies of this Permanent Injunction to all counsel of record.

/s/ T. S. Ellis III
T. S. Ellis III
United States District Judge

Alexandria, Virginia
November 22, 1989

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[2] "Rescue operation," as used here, means any activity that trespasses on, blockades, impedes or obstructs access to or egress from facilities at which abortions, family planning counseling or gynecological services are provided. Similarly, Operation Rescue has defined "rescues" as "heroic attempts by God-fearing people to save babies and mothers from abortion on a *particular day*, by *peacefully*, but *physically* blockading abortion mills with their bodies, to intervene between abortionists and the innocent victims." Operation Rescue, National Day of Rescue—October 29, 1988 (emphasis in original).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 89-1558-A

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Plaintiffs,

v.

OPERATION RESCUE, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Dec. 6, 1989]

This matter comes before the Court on Plaintiffs' Application for a Permanent Injunction to enjoin defendants, *inter alia*, from trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from, any facility in the Washington Metropolitan area that offers and provides legal abortion services and related medical and psychological counselling.

The Court sets forth here its findings of fact and conclusion of law, pursuant to Rule 52(a), Fed. R. Civ. P.

Proceedings to Date

1. This cause first came before the Court on November 8, 1989 on plaintiffs' motion for a Temporary Restraining Order ("TRO") enjoining defendants from, *inter alia*, physically impeding access to, and egress from, premises that offer and provide legal abortion services and related medical and psychological counselling. Plaintiffs moved for an expedited hearing on this matter. The Court

heard oral argument on the TRO on November 8 and 9, 1989. Plaintiffs appeared by counsel. Defendants, having received actual notice of the proceeding, as well as copies of plaintiffs' pleadings, also appeared by counsel. Defendants' counsel accepted service of plaintiffs' complaint and related papers. At the conclusion of the hearing, the Court, having made the requisite findings, issued the TRO.

2. Following the entry of the TRO, the Court, with the parties' consent, and pursuant to Rule 65(a)(2), Fed. R. Civ. P., ordered the trial of the action on the merits to be advanced and consolidated with the hearing on the application for a preliminary injunction. The consolidated and expedited merits trial was set for November 16, 1989.

3. As scheduled, the merits trial of this action commenced on November 16, 1989, lasted two (2) days and ended on November 20, 1989.[1] Plaintiffs presented oral testimony from nine (9) witnesses and introduced documentary evidence. Plaintiffs' witnesses were:

—Nancy Dickinson-Collins, registered nurse and Director of the Commonwealth Women's Clinic, Falls Church, Virginia;

—Dr. Eugene W. Williams, Jr., obstetrician-gynecologist and Medical Director of Planned Parenthood of Metropolitan Washington ("PPMW"), Washington, D.C.;

—Patricia Ireland, Vice President of the National Organization of Women "(NOW") and Director of NOW's Project Stand Up for Women.

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[1] The 10-day Temporary Restraining Order was originally scheduled to expire at 4:00 pm on Saturday, November 18, 1989. Because the trial on the merits would not be completed prior to this time, the Court, for good cause shown and pursuant to Rule 65(b), Fed. R. Civ. P., extended the TRO for an additional 10 days. The permanent injunction, superseding the TRO, was entered on November 22, 1989.

—Lieutenant Gregory D. King, Police Officer, City of Falls Chuch and Commander of Uniform Patrol, Falls Church, Virginia;

—Kirsten Johnson, General Project Staff, NOW, Washington, D.C.;

—John Alan Bates, Jr., Volunteer, NOW, Washington, D.C. and Employee, Buyers Up/Public Citizen Consumer Group, Washington, D.C.;

—Barbara Lofton, Ph.D., Clinical Administrator for Hillview Women's Surgical Center, Forestville, Maryland;

—Jessica Sutin, Administrative Manager, PPMW, Washington, D.C.; and

—Allen Turnbull, retired citizen and resident of Bowie, Maryland.

Admitted as record evidence in this case were Plaintiffs' Exhibits # 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17 and 18.

4. Defendants elected to present no evidence.

5. At the conclusion of the trial the Court stated its findings and conclusions from the bench and granted the request for a permanent injunction. These written findings of fact and conclusions of law supplement those issued from the bench.

Parties

6. Plaintiffs are nine (9) clinics ("clinic plaintiffs") that, *inter alia*, provide abortions or abortion counselling and five (5) organizations "organizational plaintiffs") that, *inter alia*, seek to establish and preserve women's rights to obtain abortions.

7. Organizational plaintiffs, National Organization for Women, 51st State National Organization for Women,

Maryland National Organization for Women, Virginia National Organization for Women and Planned Parenthood of Metropolitan Washington, D.C., Inc. are membership organizations. They sue on behalf of themselves and their members, who include women who may wish to use abortion and family planning clinics in the Eastern District of Virginia and elsewhere.

8. The Court dismissed the National Abortion Federation as a plaintiff in this action. Counsel for plaintiffs offered no evidence identifying this entity or establishing any cause of action it might have.

9. Clinic plaintiffs provide abortions services and related medical and psychological counselling to residents of the Washington Metropolitan area [2] and elsewhere. They are:

District of Columbia Clinics

—Capitol Women's Clinic, Inc., 1339 22nd Street, N.W.

—Hillcrest Women's Surgi-Center, 7603 Georgia Avenue, N.W.

Maryland Clinics

—Metropolitan Family Planning Institute, 5915 Greenbelt Road, College Park

Virginia Clinics

—Alexandria Women's Health Center, 101 South Whiting Street, Alexandria

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[2] The Washington Metropolitan area encompasses the District of Columbia, Prince Georges County and Montgomery County in Maryland and Arlington County, Fairfax County, City of Fairfax, City of Falls Church, Loudon County, Prince William County, and the City of Alexandria in Virginia. The Virginia localities are collectively referred to throughout as "Northern Virginia."

—Commonwealth Women's Clinic, 916 West Broad Street, Falls Church

—Gynecare Associates, 312 South Washington Street, Alexandria

—Metro Medical Center, Inc., d/b/a Annandale Women's Center, 2871 Duke Street, Alexandria.

—NOVA Women's Medical Center, 9900 Main Street, Suite 305, Fairfax

—Planned Parenthood of Metropolitan Washington, D.C., Inc., 5622 Columbia Pike, Suite 303, Falls Church

—Planned Parenthood of Metropolitan Washington, D.C., Inc., 10875 Main Street, Suite 208, Fairfax

—Prince William Women's Clinic, 9384-C Forestwood Lane, Manassas

10. Defendants include one (1) organization and six (6) individuals opposed to abortion and its legalization.

11. Defendant Operation Rescue is an unincorporated association whose members oppose abortion and its legalization. Its principal goals are to stop abortion and to end its legalization. Among the activities it pursues to achieve these goals are demonstrations it terms "rescues." In general, a "rescue" is a demonstration at the site of a clinic where abortions are performed. At a "rescue," the demonstrators, called "rescuers," intentionally trespass on the clinic's premises for the purpose of blockading the clinic's entrances and exits, thereby effectively closing the clinic. In so doing, "rescuers" view their blockading efforts as "rescues" of fetuses scheduled for abortion.

12. Project Rescue, The D.C. Project and The Veterans Campaign for Life were named as defendants in the amended complaint. But as reflected in the evidence, and confirmed by plaintiffs' counsel, none is a legal entity capable of being sued; rather they are names of events organized and coordinated by Operation Rescue for the

purpose of conducting "rescues" at abortion facilities in the Washington Metropolitan area. Because Project Rescue, The D.C. Project and The Veterans Campaign for Life are not legal entities, they are deleted as defendants.

13. The individual defendants are persons who are opposed to abortion and its legalization and who are deeply committed to taking active steps to advance their views, including planning, organizing and participating in "rescue" demonstrations under the banner and auspices of Operation Rescue. The individual defendants are:

—Randall Terry, National Director and Founder of Operation Rescue. Terry is currently incarcerated in the Fulton County Correctional Facility, Fulton County, Georgia. The record reflects that Terry has played, and continues to play, a leading role in organizing and coordinating "rescues" and disruptions of abortion and family planning facilities in the Washington Metropolitan area.

—Patrick Mahoney, retained Consultant to Operation Rescue. Mahoney organizes and coordinates "rescues" and related activities in the Washington Metropolitan Area for Operation Rescue. Mahoney was present at, and participated in, "rescues" organized and performed by Operation Rescue on November 17 and 18, 1989 in the Washington Metropolitan area.

—Clifford Gannett, Director of Project Rescue. Gannett organizes and coordinates "rescues" and related activities in the Washington Metropolitan area.

—Michael McMonagle organizes and coordinates "rescues" and related activities for Operation Rescue in the Washington Metropolitan area.

—Michael Bray and Jayne Bray organize and coordinate "rescues" and related activities for Operation Rescue in the Washington Metropolitan area. Jayne Bray was arrested by Lieutenant Gregory D. King of the Falls Church,

Virginia Police Department for her activities at a "rescue" demonstration at the Commonwealth Women's Clinic in Falls Church, Virginia on October 29, 1988.

Facts

14. It is indisputable that all defendants share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization. To achieve these goals, it appears from the record that the individual defendants have agreed and combined with one another and with defendant Operation Rescue to organize, coordinate and participate in "rescue" demonstrations at abortion clinics in various part of the country, including the Washington Metropolitan area. The purpose of these "rescue" demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely. No one has put this point any better than defendant Terry, who in an affidavit, states that "while the child-killing facility is blockaded, no one is permitted to enter past the rescuers . . . Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women —all are prevented from entering the abortuary while the rescue is in progress." Operation Rescue's literature defines "rescues" as "*physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims." *Operation Rescue, National Day of Rescue—October 29, 1988* (1988) (emphasis in original). By disrupting and blockading family planning and abortion clinics, defendants and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views.

15. The individual defendants, acting through and in concert with Operation Rescue, have organized "rescue" events under the names D.C. Project, Project Rescue and Veterans' Campaign for Life. These "rescue" events focused on abortion clinics in the Washington Metropolitan area and the record is replete with references confirming the individual defendants' involvement in these events. For example, defendant Gannett is the Executive Director of Project Rescue and defendants Mahoney, McMonagle and Michael Bray have assisted Operation Rescue in the organization and coordination of the District of Columbia Project and Project Rescue. Defendant Terry agreed to address an October 6, 1989 Project Rescue rally organized by defendant Gannett.

16. Because "rescuers" trespass on to clinic property and physically block ingress into and egress from the clinic, existing and prospective patients, as well as physicians and medical staff are unable to enter the clinic to render or receive medical or counselling services. This creates a substantial risk that existing or prospective patients may suffer physical or mental harm. Trial witnesses, in uncontradicted testimony, convincingly illustrated this point. For example, for some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a "rescue" demonstration closes a clinic, patients requiring the laminaria removal procedure or other vital medical services must either postpone the required treatment and assume the attendant risks or seek the services elsewhere. Uncontradicted trial testimony established that there were numerous economic and psychological barriers to obtaining these services elsewhere.[3] Hence, a "rescue" demonstra-

[3] Indigent or impecunious patients at some clinics receive abortion services for a nominal fee or free. Hospitals and other health care facilities often require insurance or full reimbursement for any services rendered. This makes it difficult, if not impossible, for indigent patients to obtain necessary services from other facilities when a "rescue" demonstration closes a clinic.

tion creates a substantial risk that a clinic's patients may suffer physical and mental harm.

17. Uncontradicted trial testimony by Dickinson-Collins, a trained mental health professional, established that blockading clinics and preventing patient access could cause stress, anxiety and mental harm (i) to women with abortions scheduled for that time, (ii) to women with abortion procedures (i.e., laminaria insertion) already underway and (iii) to women seeking counselling concerning the abortion decision.

18. Substantial numbers of women seeking the services of clinics in the Washington Metropolitan area travel interstate to reach the clinics. For example, approximately twenty (20) to thirty (30) percent of patients served at the Commonwealth Women's Clinic in Falls Church, Virginia come from out of state. Records for these patients reflect permanent residence addresses in Maryland, the District of Columbia, Pennsylvania, Texas, West Virginia, New Jersey, New York, and Florida. And at the Hillview Women's Center in Forestville, Maryland, a majority of the patients travel from out of state to obtain abortion services at the clinic. "Rescue" demonstrations, by blocking access to clinics, therefore have the effect of obstructing and interfering with the interstate travel of these women.

19. Defendants' use of "rescue" demonstrations as an anti-abortion protest is not a recent phenomenon. For example, on almost a weekly basis for the last five (5) years, Commonwealth Women's Clinic has been the target of "rescue" demonstrations by Operation Rescue. One of the largest of these occurred on October 29, 1988. That "rescue" succeeded in closing the Clinic from 7:00 a.m. to 1:30 p.m., notwithstanding the efforts of the Falls Church Police Department.[4] "Rescuers" did more than

[4] Trial testimony disclosed that the Falls Church Police Department consists of thirty (30) deputized officers. Typical of most

trespass on to the clinic's property and physically block all entrances and exists. They also defaced clinic signs, damaged fences and blocked ingress into and egress from the Clinic's parking lot by parking a car in the center of the parking lot entrance and deflating its tires. On this and other occasions, "rescuers" have strewn nails on the parking lots and public streets abutting the clinics to prevent the passage of any cars. Less than a year later, in April 1989, a similar "rescue" demonstration closed the Metropolitan Family Planning Institute in the District of Columbia for approximately four (4) hours.

20. More recently, defendants organized and planned a series of meetings, rallies and "rescues" in the Washington Metropolitan area for the weekends of November 10-12 and 18-20, 1989. These events were the impetus for plaintiffs' filing of this action. Although no Virginia clinics were "rescue" targets, several clinics elsewhere in the Washington Metropolitan area were subjected to "rescue" demonstrations. Clinics in Maryland and the District of Columbia were closed as a result of "rescues" on November 10, 11 and 12, 1989. The following weekend, on November 18, 1989, the Hillcrest Women's Surgi-Center in the District of Columbia was closed for eleven (11) hours as a result of a "rescue" demonstration. Five (5) women who had earlier commenced the abortion process at the clinic by having laminaria inserted were prevented by "rescuers" from entering the clinic to undergo timely laminaria removal.

21. Defendants use of "rescue" demonstrations as an anti-abortion protest is also widespread geographically.

"rescue" demonstrations, the rescuers outnumbered the Falls Church police officers on the scene that day. Even though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for more than six (6) hours. Limited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a facility for some period of time.

"Rescues" have taken place in many places across the country and have been enjoined in New York [5], Pennsylvania [6], Washington [7], Connecticut [8], and California,[9] as well as the Washington Metropolitan area. Recent "rescue" demonstrations in the District of Columbia and Maryland were carried out in violation of federal injunctions.[10]

22. Defendants show no signs of abandoning "rescue" demonstrations as a means of expressing their intense and deeply felt objection to abortion and its legalization. Counsel for defendants advised the Court that they know of no current plans for "rescue" demonstrations at clinics in the Northern Virginia Area. At the same time, however, defendants' counsel declined to offer the Court any assurance that such "rescue" demonstrations would not be planned and carried out in the future. Moreover, defendants' counsel also declined to report to the Court on behalf of the defendants that Operation Rescue would undertake to direct its membership to refrain from conducting "rescue" demonstrations at Northern Virginia clinics.

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[5] *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989); *New York State Nat'l Org. for Women v. Operation Rescue*, 704 F. Supp. 1247 (S.D.N.Y. 1989).

[6] *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989); *Northeast Women's Center v. McMonagle*, 665 F. Supp. 1147 (E.D. Pa. 1987).

[7] *Aradia Women's Health Center v. Operation Rescue*, No. 88-1539 R (W.D. Wash. July 7, 1989).

[8] *Town of West Hartford v. Operation Rescue*, No. H-89-400 (D.Ct. Sept. 20, 1989).

[9] *National Abortion Fed'n v. Operation Rescue*, No. CV 89-1181 (C.D. Cal. March 15, 1989).

[10] *National Org. for Women v. Operation Rescue*, 1989 W.L. 136639 (D.D.C. 1989); *National Org. for Women v. Operation Rescue*, No. 89-3038 (D.Md. Nov. 9, 1989).

23. Defendants well established history of raising and carrying out "rescue" demonstrations in the Washington Metropolitan area and elsewhere, together with their refusal to report to the Court that "rescue" demonstrations designed to close clinics would not be carried out against Northern Virginia clinics in the future, compelled this Court to conclude that there is a substantial likelihood defendants will seek to carry out "rescue" demonstrations in Northern Virginia in the immediate future. The Court also concludes that unless the threatened and unlawful acts to those clinics are immediately and permanently enjoined substantial and irreperable harm will be suffered by the plaintiffs and their members and patients who seek the services of the clinics.

Conclusions of Law

Jurisdiction & Venue

24. Plaintiffs allege violations of 42 U.S.C. § 1985(3). Therefore, this Court has jurisdiction of these claims pursuant to 28 U.S.C. §§ 1331, 1343. Plaintiffs also allege state causes of action. The Court has jurisdiction over these claims pursuant to the doctrine of pendent jurisdiction. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

25. Venue in the Eastern District of Virginia is proper under 28 U.S.C. § 1391(b).

Mootness

26. Defendants' plans for meetings, rallies and "rescue" demonstrations for November 10 through 12 and 18 through 20, 1989 were the impetus for this action. Those dates are now past and during those periods no clinic in Northern Virginia was the target of "rescue" demonstrations. These facts, defendants suggest, render this case moot. This suggestion is unpersuasive. The record reflects that defendants have organized, coordinated and

participated in "rescue" demonstrations for several years in many parts of the country, including Northern Virginia. This history coupled with the defendants' intense commitment to their anti-abortion goals points convincingly to the substantial likelihood that future "rescue" demonstrations will occur in the Washington Metropolitan area and elsewhere. Given this, the issues raised in this case are "capable of repetition, yet evading review" and, therefore, this case is not moot. *Murphy v. Hunt*, 455 U.S. 478 (1982); *see also, Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome"); *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989) (same); *Virginia v. Califano*, 631 F.2d 324, 326 (4th Cir. 1980) (same).

Standing

27. Clinic plaintiffs have standing to seek injunctive relief on behalf of themselves, their employees, and their clients. *See Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (relationship of physician to patient is sufficiently close to allow physician to assert privacy rights of patient); *Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987) (clinics that provide abortion services have standing to assert the rights of their patients, as these rights are " 'inextricably bound up' with the activity the . . . clinic desires to pursue.").

28. Organizational plaintiffs have standing to seek injunctive relief on behalf of their members. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 6 (1988) (association has standing to sue on behalf of its members when those members would have standing to bring the same suit); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (association has standing to bring suit on behalf of its members

when (i) members would otherwise have standing to sue in their own right, (ii) the interests it seeks to protect are germane to their organization's purpose and (iii) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit); *Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 260-61 (1977) (if plaintiff has "alleged such a personal stake in the outcome of the controversy as to warrant invocation of federal court jurisdiction" plaintiff has standing) (citations omitted). Thus, NOW has standing to sue on behalf of its members, who include women who may want to use abortion facilities in the Washington Metropolitan area.

29. Standing requires that a plaintiff allege personal injury fairly traceable to defendants' allegedly unlawful conduct and likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737 (1984). Plaintiffs have met these requirements. The record amply demonstrates that unless defendants' threatened and unlawful "rescue" efforts are immediately and permanently enjoined, plaintiffs, their members and patients, may suffer irreparable harm.

Causes of Action

30. Plaintiffs assert five causes of action. Two causes of action are federal claims pursuant to 42 U.S.C. § 1985 (3). The remaining causes of action are pendent state statutory and common law claims of (i) trespass, (ii) public nuisance and (iii) tortious interference with business.

A. *Conspiracy to Interfere with Plaintiffs' Right to Interstate Travel Pursuant to 42 U.S.C. § 1985(3)*

31. A cause of action under 42 U.S.C. § 1985(3) has four essential elements:

(i) a conspiracy;

(ii) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

(iii) an act in furtherance of the conspiracy;

(iv) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Griffin v. Breckenridge, 403 U.S. 88, 102-3 (1971) (as explained in *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983).

32. "A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means." 3 E. Devitt & C. Blackmar, Federal Jury Practice & Instructions § 103.23 (1987); *see also* Model Penal Code § 5.03 (Proposed Official Draft 1962). Ample record evidence reflects the existence of a conspiracy among defendants. Specifically, it reflects that the individual defendants combined with each other and with defendant Operation Rescue to plan, organize, coordinate and carry out "rescue" demonstrations that involved unlawful means, including violation of trespass and nuisance laws and Section 1985(3).

33. The Fourth Circuit has characterized the statute's "purpose" element as requiring that the conspiracy be "motivated by a specific class-based, invidiously discriminatory animus." *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985); *see also, Bloch v. Mountain Mission School*, 846 F.2d 69 (4th Cir. 1988) (unpublished opinion).

34. Contrary to defendants' argument, gender-based animus satisfies the "purpose" element of Section 1985 (3). To meet the requirement of "class-based discriminatory animus," the class must possess "discrete, insular

and immutable characteristics comparable to those characterizing classes such as race, national origin and *sex*." *Buschi*, 775 F.2d at 1257 (4th Cir. 1985) (emphasis added) (denying § 1985(3) protection to a class designated as "whistleblowers") (quoting *Bellamy v. Mason's Stores, Inc.*, 368 F.Supp. 1025, 1028 (W.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974). Plaintiffs' members and patients constitute a subset of a gender-based class meeting these requirements. There is, to be sure, a lack of uniformity among courts on this issue. *See e.g., Roe v. Abortion Abolition Soc'y*, 811 F.2d 931 (5th Cir.) (holding that patients, doctors, and abortion clinics and their staffs do not form a protected class under § 1985(3)), *cert. denied* 484 U.S. 848 (1987); *National Abortion Fed. v. Operation Rescue*, 721 F.Supp. 1168 (C.D.Ca. 1989) (same). But, the majority of courts have concluded that a gender-based animus satisfies the conspiracy requirement of § 1985(3). *See Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988) ("§ 1985(3) extends . . . to conspiracies to discriminate against persons based on sex."); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F.Supp. 165, 169 (D.Or. 1989) (§ 1985 (3) covers women seeking abortions); *Roe v. Operation Rescue*, 710 F.Supp. 577, 581 (E.D.Pa. 1989) (same); *New York State Nat'l Organization for Women v. Terry*, 704 F.Supp. 1247 (S.D.N.Y. 1989) (same); *Hunt v. Weatherbee*, 626 F.Supp. 1097 (D.Mass. 1986) (sex discrimination covered by § 1985(3)); *Skadegaard v. Farrell*, 578 F.Supp. 1209 (D.N.J. 1984) (same); *see generally* Annot. *Applicability of 42 U.S.C. § 1985(3) to Sex-Based Discrimination*, 46 A.L.R.Fed. 342 (1980). Thus, this Court concludes that a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under Section 1985(3).

35. Defendants engaged in this conspiracy for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counselling

services, of the right to travel. The right to travel includes the right to unobstructed interstate travel to obtain an abortion and other medical services. *Doe v. Bolton*, 410 U.S. 179 (1973) (in-state residence requirement as requisite to abortion service violates right to travel). Testimony at trial establishes that clinics in Northern Virginia provide medical services to plaintiffs' members and patients who travel from out of state. Defendants' activities interfere with these person's right to unimpeded interstate travel by blocking their access to abortion clinics. And, the Court is not persuaded that clinic closings affect only intra-state travel, from the street to the doors of the clinics. Were the Court to hold otherwise, interference with the right to travel could occur only at state borders. This conspiracy, therefore, effectively deprives organizational plaintiffs' non-Virginia members of their right to interstate travel.

36. Since the right to interstate travel is protected from purely private as well as governmental interference, plaintiffs need not show state action to make out a claim under Section 1985(3). *Griffin v. Breckenridge*, 403 U.S. 88, 105-106 (1971); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1360 (2d Cir. 1989).

37. The record demonstrates that the overt act requirement of the Section 1985(3) conspiracy is met here. Defendants' history of obstructionist activity, continued "rescue" training sessions, and recent violations of temporary restraining orders preventing "rescue" behavior plainly satisfy the statute's overt act requirement. *See New York State Nat'l Org. for Women*, 704 F.Supp. at 1260 (facts evidencing demonstrations aimed at preventing women from obtaining abortions satisfy the overt act requirement).

38. While the clinics are closed, patients are unable to receive medical treatment. Medical emergencies could arise in connection with abortions that would require immediate medical attention. Thus, clinic closings pose a serious threat of harm to women who are undergoing, or have undergone, abortions. Thus, defendants' continued threat to plaintiffs' exercise of their federally guaranteed right to travel satisfies the Section 1985(3) injury element. *New York State Nat'l Org. for Women*, 704 F.Supp. at 1260. Defendants' conduct clearly evidences an intent to continue this conduct.

39. Plaintiffs have, therefore, clearly established all of the elements of a violation of Section 1985(3) and as such, are entitled to relief.

B. *Conspiracy to Interfere with Plaintiffs' Privacy Rights Pursuant to 42 U.S.C. 1985(3)*

40. Plaintiffs' also seek relief on the ground that defendants' rescue demonstrations violate Section 1985(3) because they infringe on the fundamental right of plaintiffs' members and patients to obtain an abortion. Recognizing the likely absence of state action on these facts,[11]

[11] Where the claimed abortion right is a penumbral privacy right emanating from the First Amendment, state action must be shown to support a claim under Section 1985(3). *See New York State Nat'l Org. for Women*, 886 F.2d 1339, 1358 (2d Cir. 1989) ("[w]hen the asserted constitutional deprivation is based upon a right guaranteed against government interference . . . plaintiffs must demonstrate some state action."); *see also United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983) (same). There is some authority, however, that the state action requirement is satisfied when "rescuers" refuse to notify the police of their next "rescue" target, thereby rendering police officials incapable of securing equal access to medical treatment for women who choose abortion. *New York State Nat'l Org. for Women*, 704 F. Supp. at 1260; *see also Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384 (1979) ("[i]f private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause those authorities to violate the 14th Amendment"). But plaintiffs did not argue this point and for the reasons noted in the text, *infra*, the Court need not reach the merits of this doubtful argument.

plaintiffs argue, with some lack of clarity, that the putative right to an abortion is of such a fundamental character as to be guaranteed against all interference, not just governmental interference.[12] Such a claim is problematic, both because it is novel and because *Webster v. Reproductive Health Serv.*, 109 S.Ct. 3040 (1989) suggests that the law concerning a putative abortion right is in a state of flux.[13] Given this and given that there is another inde-

[12] Though plaintiffs did not specify the source of such a fundamental privacy right, they may have meant the Ninth Amendment, for it was referred to in Justice Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and mentioned by Justice Blackmun in *Roe v. Wade*, 410 U.S. 113 (1973). Some commentators, too, have advocated that amendment as the source of an unenumerated right to privacy. *See* Redlich, *The Ninth Amendment as a Constitutional Prison*, 12 Harv. J.L. & Pub. Pol'y 23 (1989). But at least one commentator has sharply criticized the whole notion of grounding any right to an abortion in a fundamental constitutional privacy right. *See* BeVier, *What Privacy is Not*, 12 Harv. J.L. & Pub. Pol'y 99 (1989).

[13] Although the Court noted that the facts of *Webster* did not present an appropriate occasion to overturn *Roe*, its decision left *Roe* ripe for attack. *See, Webster v. Reproductive Health Serv.*, 109 S.Ct. 3040, 3048 (1989). Justice Rehnquist, speaking for the Court in *Webster*, explained, "*[s]tare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.' *We think the Roe trimester framework falls into that category . . . Since the bounds [of Roe] are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.*" *Webster*, 109 S.Ct. at 3056-57 (citations omitted) (emphasis added). For additional examples of the narrowing of *Roe see, Simopoulos v. Virginia*, 462 U.S. 506 (1983) (upholding a state statutory requirement that second trimester abortions be performed only in licensed clinics); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 402 U.S. 416 (1983) (women's fundamental right to abortion is not unqualified and must be balanced against important state interests); *Harris v. McRae*, 448 U.S. 297

pendent basis for relief under Section 1985(3), the Court concludes that it is unnecessary and imprudent to venture into this thicket. Courts should avoid constitutional questions where other grounds are available and dispositive of the issues presented. *See Hurd v. Hodge*, 334 U.S. 24 (1948); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 571 (1947); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Therefore, the Court expresses no view as to the merits of plaintiffs' claim premised on a fundamental right to an abortion.

C. *Trespass*

41. It is unlawful in Virginia, (i) to enter or remain on the property of another after having been forbidden to do so, (ii) to instigate or encourage others to enter or remain on the property of another knowing that such persons have been forbidden to do so, and (iii) to enter the property of another for the purpose of damaging such property or interfering with the rights of the owner, user or occupant of such property. Virginia Code Ann. §§ 18.2-119, *et seq.* (Repl.Vol. 1988).

42. The undisputed record discloses that defendants (i) entered and remained on the property of some of plaintiffs after having been forbidden to do so, (ii) instigated and encouraged others to enter and remain on that property knowing that such persons have been forbidden to do so, and (iii) entered that property for the purpose, at least, of interfering with the rights of the owners to conduct their business and of the users to obtain medical and counselling services. Indeed, these actions are vital to defendants' avowed purposes and goals.

(1980) (upholding governmental regulations withholding public funds for non-therapeutic abortions); *Beal v. Doe*, 432 U.S. 454 (1977) (Social Security Act does not require funding non-therapeutic abortions as a condition of participating in state medicare program).

43. It is well established that these trespass statutes prohibit the conduct at issue here. *Northern Virginia Women's Medical Center v. Balch*, 617 F.2d 1045, 1049 (4th Cir. 1980) (abortion clinic's action against demonstrators based on violations of trespass statutes). And, evidence adduced at trial clearly establishes defendants' violations of the statutes in the past and the likelihood, unless enjoined, that such violations will occur in the future. Plaintiffs are, therefore, entitled to relief.

D. *Public Nuisance*

44. The common law of Virginia recognizes public nuisance as an offense. *Tisdale v. Virginia*, 114 Va. 866, 77 S.E. 482 (1913). A public nuisance is an act or condition that unlawfully operates to injure an indefinite number of persons. *United States v. County Bd. of Arlington Cty.*, 487 F.Supp. 137 (E.D. Va. 1979); *Ritholz v. Virginia*, 184 Va. 339, 35 S.E.2d 210, 214 (1945) ("any act, omission or use of property that is of itself hurtful to health, tranquility or morals or outrages the decency of a community is a nuisance"). Injury can include affecting the safety, health or morals of the public, or working a substantial annoyance, inconvenience or injury to the public in general. *County Bd. of Arlington Cty.*, 487 F.Supp. at 143. Individuals can sue to abate even if the public at large sustains injury from a public nuisance. *Harris v. Poulton*, 99 W.Va. 20, 127 S.E. 647 (1925).

45. In the absence of legislation, it is the province and duty of the courts to determine the existence of a public nuisance. *Stickley v. Givens*, 176 Va. 548, 11 S.E.2d 631 (1940). Once a court determines that a public nuisance exists, it may enjoin the nuisance in order to "restrain irreparable mischief, suppress oppressive litigation, or prevent a multiplicity of suits." *Switzer v. McCulloch*, 76 Va. 777 (1882); *see also, Ritholz v. Virginia*, 184 Va. 339, 35 S.E.2d 210 (1945); *Mears v. Colonial Beach*, 166

Va. 278, 184 S.E. 175 (1936). Of course, as with equitable remedies in general, a court ought not to enjoin a nuisance, except where there is no adequate remedy at law, or where there is a likelihood of irreparable injury. *Genheimer v. Crystal Spring Land Co.*, 155 Va. 134, 154 S.E. 489 (1930); *Talley v. Tyree*, 41 Va. (2 Rob.) 500 (1843); *Wingfield v. Crenshaw*, 3 Hen. & M. (13 Va.) 245 (1809). The undisputed record discloses that by trespassing on to a clinic's property for the purpose of blocking ingress into and egress from the property, and by hindering use of the parking lots and adjacent streets defendants' "rescue" demonstrations have created a public nuisance. *See, New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989). Accordingly, it is conduct that this Court may properly enjoin.

E. *Tortious Interference with Business Relationships*

46. The Court, having found a cause of action for injunctive relief under the state claims of trespass and public nuisance, need not reach the merits of this claim. Moreover, plaintiffs have not alleged facts sufficient to establish the elements of this cause of action. The elements of an action for tortious interference with contract rights include:

> (i) the existence of a valid contractual relationship or business expectancy;
>
> (ii) knowledge of the relationship or expectancy on the part of the interfering party;
>
> (iii) intentional interference inducing or causing a breach of the relationship or expectancy; and
>
> (iv) resultant damage to the party whose relationship or expectancy has been damaged.

Chaves v. Johnson, 230 Va. 112, 335 S.E.2d 97 (1985).

47. Because the record is unclear whether defendants knew of the existence of any contract between the clinics

and women seeking abortions and because relief is granted on the other state claims, this claim is dismissed without prejudice. Plaintiffs are not precluded, therefore, from alleging and proving facts sufficient to support this cause of action in any future proceeding.

Propriety of Injunctive Relief

48. As plaintiffs have prevailed on three of their claims, the issue of appropriate relief is presented. Plaintiffs seek a permanent injunction against defendants, and those acting in concert with them, from trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from, any facility that provides legal abortion services and related medical and psychological counseling throughout the country.[14] Plaintiffs also seek to enjoin defendants from conducting demonstrations, in the vicinity of clinics, that have the effect of harassing and intimidating plaintiffs' patients and members. For the reasons that follow, the Court concludes that plaintiffs are entitled to a carefully tailored injunction, but that the precise relief requested is overbroad.

49. Permanent injunctive relief is appropriate where (i) there is no adequate remedy at law, (ii) the balance of the equities favors the moving party, and (iii) the public interest is served. *See New York State Nat'l Org. of Women*, 704 F.Supp. at 1262; *Southern Packaging & Storage Co., Inc. v. United States*, 588 F.Supp. 532, 544 (D.S.C. 1984); *Nissan Motor Corp. v. Maryland Shipbuiding & Drydock Co.*, 544 F.Supp. 1104, 1122 (D.Md.), *aff'd* 742 F.2d 1449 (4th Cir. 1984); *LaDuke v. Nelson*, 560 F.Supp. 158, 162 (E.D. Wash. 1982); *see also, Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977). These requirements are met. Moreover, it is settled that "[p]erhaps

[14] Plaintiffs also seek damages under Section 1985(3). But plaintiffs offered no evidence as to the existence or amount of damage suffered. Accordingly, the Court does not award damages.

the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the court's discretion." 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2942 (1973), at 365. And it is the Court's view, in the exercise of its equity power, that this is an appropriate case for injunctive relief.

50. Plaintiffs have no adequate remedy at law. There is no adequate compensation in money damages that can remedy the damage from defendants' interference with plaintiffs' right to travel. Trial testimony amply supports the conclusion that women seeking abortions and counselling at abortion clinics are likely to suffer irreparable physical and emotional damage as a result of defendants' blockading of abortion facilities. Nor is the police enforcement of existing trespass statutes an adequate remedy. The inability of police officers to ensure access to clinics when confronted by defendants' "rescue" blockades warrants granting the additional injunctive remedy. *See New York State Nat'l Org. of Women*, 704 F.Supp. at 1262.

51. The Court concludes that the balance of the equities weighs decisively in plaintiffs' favor. Plaintiffs' activities, while morally objectionable to defendants, are nevertheless lawful. Defendants' "rescue" blockades are not lawful, as they involve violation of plaintiffs' rights under Section 1985(3), and under the Virginia law of trespass and nuisance.[15] The Court further concludes that the public interest is served by the issuance of a permanent injunction guaranteeing the public protection of the constitutional right to travel. Defendants' "rescue" demonstrations pose a significant and continuing threat to plaintiffs' right to travel. The lengthy and persistent

[15] This is not a case where rights clash and where resolution requires a balancing of or choosing between rights. Instead, this is a case where defendants' blockading conduct is unlawful and unprotected and it is plaintiffs' rights that are in danger of infringement.

history of "rescue" demonstrations, coupled with the recent violations of court orders, lead inescapably to the conclusion that plaintiffs face an immediate and continuing threat to their rights. Thus, the Court concludes that permanent injunctive relief is appropriate in the circumstances at bar. Specifically, the Court has ordered that,

> (1) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from the following premises: Alexandria Women's Health Center, 101 South Whiting Street, Alexandria, Virginia; Commonwealth Women's Clinic, 916 West Broad Street, Falls Church, Virginia; Gynecare Associates, 312 South Washington Street, Alexandria, Virginia; Metro Medical Center, Inc. d/b/a Annandale Women's Center, 2871 Duke Street, Alexandria, Virginia; NOVA Women's Medical Center, 9900 Main Street, Suite 305, Fairfax, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 5622 Columbia Pike, Suite 303, Falls Church, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 10875 Main Street, Suite 208, Fairfax, Virginia; Prince William Women's Clinic, 9384-C Forestwood Lane, Manassas, Virginia.
>
> (2) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner, or by any means, trespassing on, blockading, impeding or obstructing

> access to or egress from any facility at which abortions, family planning or gynecological services are provided in Arlington County, Fairfax County, City of Fairfax, City of Falls Church, Loudoun County, Prince William County or the City of Alexandria.

52. Plaintiffs' request for nationwide injunctive relief is overbroad. Even assuming, *arguendo*, that plaintiffs have shown a need for such expansive relief, the practical problems of enforcement for violations in far-off locations, coupled with the variation in state laws and enforcement capability, militate convincingly against granting such relief. Moreover, it appears that courts in other jurisdictions have already issued injunctive relief in the face of "rescue" demonstrations. Violations of those orders are properly resolved in the issuing courts and there is no need for an additional layer of injunctive relief.

53. Plaintiffs' request is also overbroad in seeking to enjoin those "rescue" activities that tend to intimidate, harass or disturb patients or potential patients of the clinics. Defendants have a significant First Amendment right to express their view on the vitally important issue of abortion and nothing in the permanent injunction should be construed to limit that right. Defendants' First Amendment right to express their views cannot be curtailed or limited because some persons are timid or reluctant to hear expressions of defendants' views on the issue of abortion.[16] Thus injunctive relief must not abridge de-

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[16] Indeed, the First Amendment concept of a "free marketplace of ideas," taken seriously, necessarily entails that a citizen of a democracy has a duty to listen open-mindedly to opposing views on vital issues. It was distressing, therefore, to hear one of NOW's supporters testify at trial that he declined an invitation to engage in a discussion on the merits of the abortion issue with one of the defendants. Yet it is precisely this type of discussion between persons with opposing views that is contemplated by the First Amendment and is necessary as a first step in reaching a societal accommodation on this issue.

fendants' First Amendment rights to express their abortion views in an appropriate manner in the vicinity of abortion clinics. At the same time, however, the defendants may not use the First Amendment as an excuse to engage in unlawful conduct or to infringe a person's right of access to an abortion clinic. "Rescue" blockades that involve trespass, denial of access to the clinics, and defacement or damage to clinic property cannot be shielded by the First Amendment.

54. Plaintiffs' request for injunctive relief is overbroad in yet another respect. Plaintiffs requested the Court to order defendant Operation Rescue to mail to its entire membership, in its newsletter or otherwise, notice of the permanent injunction and its terms. Because Operation Rescue claims nationwide membership and because the permanent injunctive relief ordered by the Court is limited to the Northern Virginia area, national mail notice, through a newsletter or otherwise, is unnecessary. Instead, the Court will require defendants, their members, servants, employees and attorneys or any persons acting in concert with them to give notice of the injunction and its terms to all persons who assemble to participate in "rescue" demonstrations or similar events organized or promoted by defendants in the Northern Virginia localities.[17] In connection with this requirement, the Court will also direct defendants to file with the Court and serve on plaintiffs' counsel an affidavit establishing that

[17] This requirement does not impermissibly infringe defendants' First Amendment rights. It does not unconstitutionally require defendants to associate with speech with which they may disagree. *Compare Pacific Gas & Elec. Co. v. Public Util. Comm'n of California*, 475 U.S. 1, 15 (1986) (holding unconstitutional Commission's requirement that utility company enclose third-party newsletters in utility's billing envelopes). In *Pacific Gas*, the enclosure requirement was the Commission's overbroad means of furthering the state's interest in dissemination of utility rate information; the requirement was not pursuant to a court's narrowly tailored injunction.

the required notice concerning this injunction was given and describing with particularity the manner in which notice was given.

55. Similarly, the Court also concludes that it is appropriate for the permanent injunction to give notice of the likely consequences of a violation of its terms. To this end, the permanent injunction includes the following provision:

> The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys or any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction by personal service or otherwise and who violate the provisions of this Permanent Injunction and are held in contempt of court, may be imprisoned and fined $1,500. The Court may impose greater or lesser fines in the event of aggravating, mitigating or extenuating circumstances.

56. Moreov[illegible]e circumstances may change, the Court provid[illegible] the permanent injunction will expire at 5:[illegible] July 31, 1990, unless the plaintiffs show good [illegible]ts extension.

Conclusion

57. Plaintiffs [illegible]n attorney's fees, pursuant to 42 U.S.C. § 1988. The purpose of Section 1988 is to "ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citations omitted). A Court in a Section 1985 action may, therefore, in its discretion, "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," pursuant to Section 1988. *Hensley*, 461 U.S. at 424 (1983). "A plaintiff must be a 'prevailing plaintiff' to recover an attorney's fee" under this section. *Hensley*, 461 U.S. at

433 (footnote omitted). Plaintiffs typically are considered "prevailing parties" if "they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433 (citations omitted). In this case, the plaintiffs have substantially prevailed.

58. The amount of attorney's fees awarded is to be determined on the basis of the facts of each case. *Hensley*, 461 U.S. at 429. Accordingly, the Court has directed the parties to submit supplemental memoranda on the issue of the appropriate amount of attorney's fees, if any.

/s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
6 December 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 89-1558-A

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Plaintiffs,

v.

OPERATION RESCUE, *et al.*,
Defendants.

ORDER

[Filed Feb. 13, 1990]

This matter first came before the Court on November 8, 1989 on plaintiffs'[1] motion for a Temporary Restraining Order ("TRO") enjoining defendants from, *inter alia*, physically impeding access to, and egress from, premises that offer and provide legal abortion services and related medical and psychological counselling. Plaintiffs moved for an expedited hearing on this matter. The Court heard oral argument on the TRO on November 8 and 9, 1989. Plaintiffs appeared by counsel. Defendants, having received active notice of the proceeding, as well as copies of plaintiffs' pleadings, also appeared by counsel. Defendants' counsel accepted service of plaintiffs' complaint and related papers. At the conclusion of the hearing, the Court made the requisite findings and issued the TRO.

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[1] Plaintiffs in this case are nine (9) clinics ("clinic plaintiffs") that, *inter alia*, provide abortions or abortion counseling and five (5) organizations ("organizational plaintiffs") that, *inter alia*, seek to establish and preserve women's right to obtain abortions.

Following the entry of the TRO, the Court, with the parties' consent, and pursuant to Rule 65(a)(2), Fed. R. Civ. P., ordered the trial of the action on the merits to be advanced and consolidated with the hearing on the application for a preliminary injunction. The consolidated and expedited merits trial was set for November 16, 1989. As scheduled, the merits trial of this action commenced on November 16, 1989, lasted two (2) days and ended on November 20, 1989. At the conclusion of the evidence and after argument of counsel, the Court issued its Findings of Fact and Conclusions of Law first from the bench and then in a Memorandum Opinion. *National Organization of Women, et al. v. Operation Rescue, et al.*, 726 F.Supp. 1483 (E.D.Va. 1989). Essentially, the Court found that defendants (i) conspired to interfere with plaintiffs' right to interstate travel in violation of 42 U.S.C. § 1985(3); (ii) trespassed on plaintiffs' property in violation of Virginia Code §§ 18.2-119, *et seq.* (Repl. Vol. 1988); and (iii) committed a public nuisance in violation of the common law of Virginia. *Id.* A permanent injunction issued. The Court took under advisement the attorney's fees issue and gave the parties an opportunity to submit supplemental memoranda and other appropriate material on the matter. Both parties made submissions to the Court. Accordingly, this Order sets forth the Court's ruling on the attorney's fees in this case.

Well settled principles govern the award of attorney's fees in civil rights cases. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides that the court, "in its discretion, may allow the prevailing party [in a federal civil rights action] . . . a reasonable attorney's fee." 42 U.S.C. § 1988. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976). Accordingly, a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'"

Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (citing S. Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin. News 1976, p. 5908); *see also, Spell v. McDaniel*, 852 F.2d 762 (4th Cir. 1988). It is, however, the "fee applicant [who] bears the burden of establishing by clear and convincing evidence the amount of a reasonable fee in the circumstances." *Equal Employment Opportunity Comm'n v. Nutri/System, Inc.*, 685 F.Supp. 568, 572 (E.D.Va. 1988). Of course, "'[m]athmatical precision is rarely achievable' when determining a reasonable fee award. Indeed, such precision would, in many instances, require a 'full scale second trial'—the result being that the attorney's fee issue would become the proverbial tail that wags the dog." *Spencer v. General Elec. Co.*, 706 F.Supp. 1234, 1237 n. 28 (E.D.Va. 1989) (citations omitted).

Given these principles, the starting point for ascertaining a reasonable fee is the calculation of the "lodestar figure." *Hensley*, 461 U.S. at 434. This figure is the product of two factors: (i) the number of hours spent on legal tasks and (ii) the appropriate hourly rate for legal services. *Id.* Fee applicants must furnish specific support for both factors. *Hensley*, 461 U.S. at 433, *see also, Blum v. Stenson*, 465 U.S. 886, 895-96 (1984) (applicants must furnish specific support for hourly rate proposed); *Nutri/System*, 685 F.Supp. at 573 (applicants must furnish specific support for hours spent). "Typically, a reasonable hourly rate is established by affidavits from lawyers with first-hand knowledge of the prevailing community rate in comparable cases for counsel with similar qualifications." *Id.* (citations omitted).

After the figure is calculated, it may be appropriate to increase or decrease the figure on the basis of one, or more, of the following factors:

(1) the time and labor expended;

(2) the novelty and difficulty of the questions raised;

(3) the skill required to properly perform the legal services rendered;

(4) the attorney's opportunity costs in pressing the instant litigation;

(5) the customary fee for like work;

(6) the attorney's expectations at the outset of the litigation;

(7) the time limitations imposed by the client or circumstances;

(8) the amount in controversy and the results obtained;

(9) the experience, reputation and ability of the attorney;

(10) the undesirability of the case within the legal community in which the suit arose;

(11) attorneys' fees awards in similar cases, *Nutri/System, Inc.*, 685 F.Supp. at 574 (footnote omitted).

With these principles in mind, the Court can analyze the fee application made by counsel for plaintiffs, the prevailing party in this case.

Plaintiffs' fee application, submitted by local counsel, Covington & Burling, consists of an unsworn twelve page pleading to which are attached declarations of Pamela S. Passman, a Covington & Burling lawyer, and Alison Wetherfield, a NOW Legal Defense Fund lawyer who resides in New York. The total fee claimed is $71,535.25. This amount is alleged to represent approximately 437 hours of legal work, performed by both local and New York counsel, billed at rates varying from $65 to $300 per hour. The total disbursements claimed are $2,276.55.

Close scrutiny of plaintiffs' claim for fees and costs compels the conclusion that it is manifestly excessive. This was not a complicated case. It was, essentially, a simple trespass action only modestly complicated by an

unsettled § 1985(3) issue.[2] Thus, the time billed for legal work in connection with this matter, as well as the rates at which it was billed, is out of proportion to the scale and nature of the case. Moreover, the application fails to meet the requisite documentation standards. As this Order reflects, plaintiffs' counsel overstaffed, overworked, overbilled, and underdocumented this case. These deficiencies are examined in greater detail in the following paragraphs.

I. *Local Counsel's Application*

A. Attorneys' Fees

Local counsel's documentation in support of its fee application displays, in chart form, the hourly rates of the army of lawyers/paralegals who worked on this matter and general statements of the time each individual spent on various legal tasks. The information is presented in eight categories, each representing a different stage of the litigation: (1) preliminary matters; (2) initial pleadings; (3) TRO hearing; (4) amended complaint; (5) trial brief and preparation for trial; (6) permanent injunction trial; (7) post trial matters; and (8) application for attorneys' fees. The application indicates that the total time declared for stages 1 and 2, *i.e.* "Preliminary Matters" and "Initial Pleadings," was calculated by dividing by three the total time spent on those matters to account for the fact that plaintiffs were also litigating the same issues in federal courts in Maryland and the District of Columbia. Thus, plaintiffs' fee application apportions one-third of the charges at those stages to the Virginia litigation. This practice does not meet the requirement that fee claimants "submit docu-

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[2] That issue was whether plaintiffs' members and patients constitute a subset of a gender-based class meeting the "class based discriminatory animus" requirement of a § 1985(3) cause of action. Also raised, but not reached by the Court, was whether defendants' conspiracy interfered with or violated plaintiffs' putative First Amendment privacy right to obtain an abortion.

mentation that reflects reliable *contemporaneous recordation* of time spent on legal tasks that are described with *reasonable particularity*." *Nutri/System*, 685 F.Supp. at 573 (emphasis added). The instant suit was commenced after the District of Columbia litigation and before the Maryland litigation. At best then, the division of fees and costs into thirds for these stages is a rough approximation that fails to meet the contemporaneous recordation standards. The three suits, although similar in many respects, were not identical. Because different jurisdictions were involved, the suits were in some measure factually and legally distinct. In any event, no reason appears why counsel could not have maintained separate time records for the tasks peculiar to each lawsuit, while noting specifically the time devoted to tasks common to all three suits. Since the tasks pertaining specifically to the Virginia litigation for these stages are not recorded with particularity, the Court is unable to "weigh the hours claimed against [its] own knowledge, experience, and expertise of the time required to complete similar activities." *Nutri-System*, 685 F.Supp. at 573 (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974)). No doubt some reasonable period of time during these stages is attributable to the Virginia litigation, but "[i]nadequate documentation is a basis for reducing or denying a fee award." *Nutri/System*, 685 F.Supp. at 573 (citing *Hensley*, 461 U.S. at 433.).

Even assuming that one-third of the total time spent is properly attributable to the Virginia litigation, the figures offered lead, inescapably, to the conclusion that the initial stages of this litigation were over staffed and consumed an inordinate amount of time. The fee application claims 16 hours for "preliminary matters" in the Virginia litigation. This means local counsel spent 48 hours of billable time, totalling $6,476.25, on "meetings with clients to discuss matter and strategy, legal research re: jurisdictional limitations on injunctions; fact gathering; Meetings/telephone calls with Covington & Burling Team ("C & B Team") and co-counsel." No portion of this time is attributed to preparation of the Complaint, for that time is subsequently recorded under "initial pleadings," nor was any time attributed to settlement negotiations with defendants. It is difficult to understand how so much time could reasonably be spent on the matters noted, especially since a large number of hours was also spent on research in stage 2.

For stage 2, the fee application claims 82.55 hours (one-third of 247.64 hours) for "initial pleadings." Of the 82.55 hours, the lion's share was billed by an attorney whose rate is $170 per hour. With one exception, this is the highest hourly rate charged by any attorney on the local counsel team. Yet not all the tasks listed under "initial pleadings" seem commensurate with this billing rate. They include "legal research and drafting pertaining to the complaint . . . affidavits, compile exhibits to memorandum . . . meetings and correspondence with clients concerning fact gathering . . . [and] filing of initial papers and coordinating service of process." Plaintiffs have not established facts through "affidavits from lawyers with first-hand knowledge of the prevailing community rate in comparable cases for counsel with similar qualifications," to justify this $170 per hour billing rate for these sorts of tasks. *Nutri/System*, 685 F.Supp. at 573. Plaintiffs reliance on a 1988 Price, Waterhouse salary survey does not satisfy this standard. This survey covers only the fifteen largest firms in the District of Columbia; it does not discuss the rate with respect to comparable cases, nor does it discuss with particularity counsel's qualifications. Further, although "[r]ecent fee awards in similar cases . . . may . . . be probative," plaintiffs have submitted no such information. Moreover, even accepting the rate charged, it is difficult to understand why these tasks required a total of 247.64 hours to complete.

The claim for time spent on the amended complaint (stage 4), $1,160.00, also appears excessive. The amended complaint in this case merely added the names of certain clinics; it required little substantive work. The fee application itself reflects the simple and routine nature of this work: "Draft and file amended complaint; discussions with clients and clinics interested in becoming Plaintiffs." Yet, of the 5 total hours claimed on the fee application for this task, 3 hours are claimed at the maximum rate that appears on this fee application, $300 per hour. Without documentation justifying this hourly rate for this task, the Court is left to question how prudent time management could dictate using the skills of a $300 per hour lawyer on a task so free from complexity. The Court does not doubt that this lawyer properly commands this hourly rate in appropriate complex litigations. In this instance, however, a lawyer with this level of expertise was unwarranted. Of course, a firm may wish to commit this lawyer to the task for other reasons, but in that event, it may not charge an hourly rate appropriate only in another context.

The 220 total hours spent at stage 5 ("Trial Brief and Preparation for Trial") and stage 6 ("Permanent Injunction Trial") also demonstrates over staffing and excessive use of attorney time. First, these two stages utilized the time of six attorneys and paralegals. It is unclear why a case of this modest complexity should require such a battalion of legal personnel. While it is true that plaintiffs' memorandum was well researched, well organized and well written, it is equally true that it should not have required as much lawyer time to prepare as it apparently did. In addition, many of the legal tasks described at stage 5 appear to be duplicated, without explanation, at stage 6. For example, both stages indicate time spent on "meeting and correspondence with clients concerning fact gathering"; "meetings/telephone calls with C&B Team and co-counsel to discuss legal issues and

strategy"; "prepar[ing] potential exhibits"; and "interview[ing]" or "prepar[ing]" potential witnesses. Given the description of the tasks performed during the hours claimed, there is no apparent justification for using 48 hours of a $300 per hour attorney's time and 36 hours of a $170 per hour attorney's time.

Perhaps the plainest example of excessive lawyer time is the 41 hours claimed for the fee application, which consists chiefly of a chart describing the time spent on various tasks, multiplied by hourly rates, to yield a total dollar amount of fees charged. For this, plaintiffs claim $5,837.50 in attorneys' fees.[3] This amount represents a surprising 9% of the total fees claimed. There is no readily apparent justification for the number of hours devoted to this task. The law regarding award of attorneys' fees is well established and straightforward. A half hour's library search would have turned up the *Hensley*, *Spell*, *Johnson*, and *Nutri/System* decisions and others as well. Research, then, should not have consumed much time. Moreover, if billable time was recorded contemporaneously, compilation of the documentation for the fee application should also have been straightforward and not particularly time consuming. It is, therefore, puzzling that the fee application required six attorneys and paralegals to devote 41 hours to its preparation.

Examination of the fee application as a whole reflects that for virtually every documented task, the lodestar figure is excessive with respect to both its variables; the number of hours spent on each task is excessive and the rate at which those hours were billed is, in some instances,

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[3] Counsel's figure, based on the time billed and hourly rates claimed, is actually incorrect. Counsel indicates that Karen Christiansen claimed 3 billable hours, at a rate of $65 per hour, for time spent on the application for attorneys' fees. The total fee claimed for her time is listed as $56.00. 3 hours at a rate of $65 per hour should yield a fee of $195.00. Thus, the Grand Total for counsel's fee application charges should be $5,967.50, not $5,837.50.

too high for the type of work involved. Beyond this, the supporting documentation is inadequate. The descriptions are excessively vague; they do not adequately detail the work performed. "[I]t is 'insufficient to provide the District Court with very broad summaries of work done and hours logged.'" *Nutri/System*, 685 F.Supp. at 574 (quoting *National Ass'n of Concerned Veterans*, 675 F.2d 1319, 1327 (D.C. Cir. 1982)). Further, task descriptions are duplicated from stage to stage without any indication of how they are different tasks and, therefore, properly billable more than once. It is incumbent on the fee applicant to "make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. Without more specific documentation, the Court cannot ascertain that this has been done.

In summary, local counsel's lodestar figure is inadequately supported. In these circumstances, "courts have exercised their discretion to cut the proposed figure by a fixed percentage or amount based on the judge's overall familiarity with the case. *See, e.g., Uzzell v. Friday*, 618 F.Supp. 1222, 1226, 1229 (M.D.N.C. 1985) (fees reduced 25% for attorneys and 35% for paralegals as a result of inadequate documentation)." *Nutri/System*, 685 F.Supp. at 576. Given all the facts and circumstances of this case, the Court concludes that the proposed lodestar figure should be $22,500.00. The Court arrived at this figure based on the Court's "overall familiarity with the case, its complexity, and the counsel involved." *Nutri/System* at 576. Specifically, the Court multiplied 150 billable hours by an average hourly rate of $150. This hourly rate is reasonable for the work performed in this case; it roughly averages the higher billing rates of partners with the lower rates of associates and paralegals.[4] The total time

[4] It is understandable that some lawyers in local counsel's firm would bill at a higher rate than others. But the Court is aware of many lawyers in the Northern Virginia area, in small firms or as sole practitioners, who could have tried this case competently for $150 per hour. This, too, supports the reasonableness of this hourly rate.

of 150 hours is a reasonable amount of time to prepare and try this matter, especially given the fact that the case progressed briskly from filing to disposition in less than two weeks. No time was needed for discovery. In the Court's view, the following estimates support the reasonableness of the 150 hour figure: 50 hours of research and brief preparation; 30 hours of witness preparation; 20 hours of trial preparation; 20 hours of trial hearings; and 30 hours of miscellaneous post-trial tasks. An award of $22,500.00, the Court believes, fairly accounts for the inadequate documentation and also appropriately accommodates the factors set forth in *Spell*. *See, supra* at 4. Accordingly, the Court awards plaintiffs' $22,500.00 in attorneys' fees for representation by local counsel.

B. Expenses

In addition to attorneys' fees, a "prevailing plaintiff in a civil rights action is entitled . . . to recover 'those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services.'" *Spell*, 852 F.2d at 771 (quoting *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979). The Court must examine costs, as it examines fees, to determine their reasonableness. Meticulous documentation is therefore necessary to afford the Court meaningful review of a claim for costs. In this case, the documentation submitted is deficient. Counsel indicates that its $1,877.70 claim for disbursements was calculated by the same method as its attorneys' fees for stages 1 and 2 of the litigation, *viz.*, by dividing the total amount of disbursements in all three suits by three. This method of calculation is not acceptable; while there may have been some common costs, there were doubtless many costs that were specific

to the Virginia litigation. The disbursements claimed include, *inter alia*, "transportation, messengers, telephone/fax, mail." In some degree, the cost of these services is determined by specific distances traveled. Thus, the transportation, messenger, telephone/fax and mail costs of the Virginia litigation are unlikely to be the same as the transportation costs attributable to the Maryland or District of Columbia suits. Counsel's calculation of disbursements in this manner suggests to the Court that counsel failed to keep accurate records of the disbursements actually incurred with respect to the Virginia litigation. Plaintiffs, therefore, have failed to meet their burden of establishing by clear and convincing evidence the amount of a reasonable cost in the circumstances. *See Nutri/System*, 685 F.Supp. at 572. Accordingly, the Court awards plaintiffs only those costs that are specifically identifiable, namely the costs for transcripts and filing fees, which total $1,107.00.

II. *New York Counsel's Application*

A. Attorneys' Fees

In some respects, New York counsel's fee application suffers from the same flaws that compelled the Court to reduce the fees and costs claimed by local counsel. For example, it presumes, in calculating "phase 1" hours, that dividing by three the total number of hours spent on the three suits is an acceptable method of calculating the number of billable hours for purposes of the lodestar figure. As noted, this methodology falls short of the documentation requirements of fee awards. Moreover, the fee application claims fees during "phase 1" for legal work performed outside the scope of the Virginia litigation. In particular, the application claims fees for 2.1 hours of "preparation for argument in D.C." and 8.0 hours of activities in connection with the "D.D.C. court appearance," including "meeting with D.C. police counsel and preparation with police witnesses." These hours, while

perhaps compensable under another court's jurisdiction, are not compensable by an award of this Court for attorneys' fees. The 26.6 hours claimed for "phase 2" are designated as pertaining only to the Virginia litigation. Those hours, in contrast to the hours in "phase 1," are documented with commendable particularity. Further, the time claimed for each task seems reasonable.[5]

The hourly rate variable of the lodestar figure, however, is not supported. As noted above, there has been no justification for the rates charged in this case. The Court, therefore, will allow New York counsel the same hourly rate, $150, as allowed local counsel.

Accordingly, the Court concludes that the proposed lodestart figure for New York counsel should be $3990.00, representing 26.6 hours billed at an hourly rate of $150.

B. Expenses

New York Counsel's fee application claims $398.85 in expenses in connection with this case. The Court concludes that only $180.55 is reasonable. Applying the same principles applied throughout the Court's evaluation of this fee application, the Court finds all of the "phase 1" expenses unreasonable as they are expenses incurred in connection with the trio of suits and not specifically attributable to the Virginia litigation. With respect to the "phase 2" expenses, however, the Court reaches a different result. These expenses were incured solely in regard to the Virginia suit and appear reasonable.

Accordingly, the Court awards New York counsel $180.55 in expenses.

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[5] The 3.0 hours reasonably claimed in regard to the attorneys' fees application stands in sharp contrast to the 41 hours claimed by local counsel.

III. *Conclusion*

For the reasons stated above, the Court hereby ORDERS defendants to pay plaintiffs a total of $27,687.55 representing $26,490.00 in attorneys' fees and $1,287.55 in costs.

Nothing in this Order should be construed as critical of the quality of legal work performed by plaintiffs' counsel. The case was competently prepared and tried. This Order simply records (i) that the hours devoted to the case were excessive; (ii) that the hourly rates, in some instances, were too high; and (iii) that the fee claim was not properly documented.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia
February 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 89-1558-A

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Plaintiffs,

v.

OPERATION RESCUE, *et al.*,
Defendants.

INJUNCTION

[Filed Sept. 21, 1990]

By Order dated November 22, 1989, this Court entered an Injunction that, *inter alia*, enjoined defendants and their agents from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from various facilities in the Northern Virginia area that provide abortion counselling and services. That injunction was once extended and is scheduled now to expire at 5:00 p.m., September 24, 1990, absent a showing of a continuing need for injunctive relief.[1]

Pursuant to the Court's November 22, 1989 Injunction Order, July 31, 1990 Injunction Order, and Local Rule 11(E), plaintiffs, on July 6, 1990, filed a motion for renewal of the injunction on which they continue to rely.

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[1] The United States Court of Appeals for the Fourth Circuit affirmed the injunction in all respects. *See National Organization for Women, et al. v. Operation Rescue, et al.*, No. 90-2606 (4th Cir. September 19, 1990).

In support of their Motion, plaintiffs argue that since the entry of the Injunction in November, 1989, the threat of defendants' illegal activities has not diminished and that defendants' "rescue" activities have continued unabated in the Washington Metropolitan area with promises of future "rescues," including a repeat "D.C. Project" rescue in November 1990. The evidence submitted by plaintiffs, particularly letters and deposition testimony, reveals blockading-type "rescue" activity in the Washington, DC metropolitan area during the past six months. Plaintiffs also introduced evidence that points persuasively to the conclusion that defendants intend similar activities in the area during the next few months.

In light of this evidence, the Court requested of defendants whether they could represent that future activity in violation of the injunction would not occur. Defendants stated that they could not make this representation.

On the record presented, the Court finds that plaintiffs have made an adequate showing of a continuing need for injunctive relief, thus warranting the extension of the injunction. Based on this, and in the absence of any representation by defendants that without the injunction no blockading activity will occur, the Court, in its discretion, GRANTS plaintiffs' Motion for an Extension of the Injunction. Accordingly, the Injunction's provisions are continued in full force and effect until *5:00 pm on Monday, September 24, 1991.*

The Court, therefore, ADJUDGES, ORDERS and DECREES that:

(1) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner

or by any means, trespassing on, blockading, impeding or obstructing access to or egress from the following premises: Alexandria Women's Health Center, 101 South Whiting Street, Alexandria, Virginia; Commonwealth Women's Clinic, 916 West Broad Street, Falls Church, Virginia; Gynecare Associates, 312 South Washington Street, Alexandria, Virginia; Metro Medical Center, Inc. d/b/a Annandale Women's Center, 2871 Duke Street, Alexandria, Virginia; NOVA Women's Medical Center, 9900 Main Street, Suite 305, Fairfax, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 5622 Columbia Pike, Suite 303, Falls Church, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 10875 Main Street, Suite 208, Fairfax, Virginia; Prince William Women's Clinic, 9384-C Forestwood Lane, Manassas, Virginia.

(2) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from any facility at which abortions, family planning or gynecological services are provided in Arlington County, Fairfax County, City of Fairfax, City of Falls Church, Loudoun County, Prince William County or the City of Alexandria.

(3) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert with it are directed to inform all persons who assemble to participate in a "rescue" operation [2] or simi-

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[2] "Rescue operation," as used here, means any activity that trespasses on, blockades, impedes or obstructs access to or egress

lar event in concert with the defendants in the localities listed above in paragraph 2, of this Injunction and its terms. In the event of a "rescue" operation or similar event within the area covered by this Injunction, defendants are directed to file with the Court and serve upon the counsel for plaintiffs an affidavit establishing compliance with this paragraph and describing with particularity the means by which compliance was achieved. This affidavit is to be filed and served within three (3) days of the "rescue" operation or similar event.

(4) The individual defendants, and defendant Operation Rescue, its officers, agents, members, sevrants, employees, and attorneys or any persons acting in active concert or participation with it who receive actual notice of this Injunction by personal service or otherwise and who violate the provisions of this Permanent Injunctio and are held in contempt of court, may be imprisoned and fined $1,500. The Court may impose greater or lesser fines in the event of aggravating, mitigating or extenuating circumstances.

(5) This Injunction terminates at 5:00 p.m., September 24, 1991,[3] but may be extended for good cause shown.

(6) Plaintiffs are directed to deliver a copy of this Permanent Injunction to all of the police departments in each of the localities listed in paragraph 2.

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from facilities at which abortions, family planning counseling or gynecological services are provided. Similarly, Operation Rescue has defined "rescues" as "heroic attempts by God-fearing people to save babies and mothers from abortion on a *particular day*, by *peacefully*, but *physically* blockading abortion mills with their bodies, to intervene between abortionists and the innocent victims." Operation Rescue, National Day of Rescue—October 29, 1988 (emphasis in original).

[3] *See Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661, 696 (D. Minn. 1986) ("Normally, the duration of an injunction is designed to preclude defendant's wrongful activities for a period of time reasonably necessary to protect plaintiffs' interest . . . .").

Nothing in this Injunction should be construed to limit defendants' free exercise of their First Amendment rights. More specifically, nothing in this Injunction limits defendants' First Amendment right to express their views on abortion publicly and in a proper manner in the vicinity of any facility. But defendants may not use the First Amendment as an excuse to violate plaintiffs' rights.

The Clerk is directed to issue copies of this Injunction to all counsel of record.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia
September 21, 1990

Supreme Court, U.S.
FILED
JAN 22 1991
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No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, OPERATION RESCUE, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

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January 22, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

I. Whether respondents' federal claims under 42 U.S.C. § 1985(3) were sufficient to support the district court's exercise of its discretion to take jurisdiction over and render judgment on respondents' pendent state-law claims.

II. Whether the court below was correct in affirming the district court's conclusion that petitioners violated 42 U.S.C. § 1985(3).

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BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

This brief is submitted in opposition to the pending Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals.[1] Respondents are the National Organization for Women ("NOW"), the Virginia, Maryland, and Washington, D.C. chapters of NOW, Planned Parenthood of Metropolitan Washington,

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[1] In the Fourth Circuit, this case was captioned National Organization for Women v. Operation Rescue.

D.C., Inc., and a number of medical facilities that provide gynecological services, including abortions.[2]

The Petition seeks this Court's review of a *per curiam* decision which upheld an injunction against petitioners' physical blockades of medical facilities which provide family planning and gynecological services, including abortions, to women in the Washington metropolitan area. The court of appeals found that petitioners' blockades—referred to by them as "rescues"—violated 42 U.S.C. § 1985(3) (1988) by preventing women who traveled interstate from exercising their federal right to obtain the services of the blockaded clinics. The court of appeals further declined to reverse the district court's exercise of pendent jurisdiction to enjoin state law trespass and public nuisance violations.

The Fourth Circuit's decision as to both the federal and the state claims is squarely in agreement with the decision of the Second Circuit in *New York State NOW* v. *Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). This case dealt with essentially the same conduct by the same parties, and resolved the same claims, as are presented here. It is the only other court of appeals decision in point. Petitioners' tortured attempts to paint a conflict in the circuits by citation to other cases, and to downplay the Second Circuit's decision, do not withstand analysis. This Court denied certiorari in *New York State NOW*, and it should decline to review this similar decision.

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[2] Petitioners' list of respondents omits the Prince William Women's Clinic. Planned Parenthood of Metropolitan Washington, D.C., Inc. is the only respondent that is a corporation. It has no parent or subsidiary corporations.

COUNTER-STATEMENT OF THE CASE

This action was initiated when petitioners publicly threatened to organize and implement "mob" blockades that by force would prevent women from securing medical services at clinics that perform abortions in the Washington metropolitan area.[3] Respondents alleged that petitioners had conspired in violation of 42 U.S.C. § 1985(3) (1988) to deny women their constitutional rights to travel interstate and to choose abortion. In addition, respondents alleged that petitioners also violated state laws forbidding trespassing, creating a public nuisance, and tortiously interfering with business relations.

Finding respondents' federal claim to be substantial and taking pendent jurisdiction over the state claims, District Court Judge T.S. Ellis, III granted emergency relief. Pursuant to Fed. R. Civ. P. 65(a)(2), the court then consolidated the preliminary injunction hearing with trial on the merits. Respondents presented nine witnesses and sixteen exhibits, including evidence of blockades that occurred in Washington, D.C. and Maryland while the hearing was ongoing (despite preliminary orders in those jurisdictions forbidding the blockades). Petitioners called no witnesses and introduced no evidence. The court granted the application for a permanent injunction from the bench

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[3] Respondents brought suit in the District of Columbia seeking declaratory and injunctive relief to prevent such blockades. The district court granted temporary relief in the District of Columbia, but exercised its discretion not to extend relief to portions of the metropolitan area outside the city proper. Respondents then brought parallel suits seeking similar relief in the District of Maryland and the Eastern District of Virginia. Each court has granted injunctive relief.

and subsequently published its findings and conclusions. *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 1483, App. 14a (E.D. Va. 1989).[4]

The district court found that "[s]ubstantial numbers of women" seeking abortion in the Washington metropolitan area traveled from another state to reach a medical facility; for example, approximately 20 to 30 percent of the patrons of the Commonwealth Women's Clinic in Virginia traveled interstate. *Id.* at 1489, App. 22a. The court also found that petitioners had illegally blockaded such facilities so as to bar access by patients. During these events, the court found, petitioners had trespassed on the property of gynecological clinics, destroyed property, defaced signs, blockaded parking lots, and strewn nails throughout parking lots. *Id.* at 1489-90, App. 22a-23a. The facilities were often closed down, patients were denied services, and mass arrests were usually necessary before the facilities could be re-opened. *Id.* at 1489 n.4, App. 22a.

The district court further found that petitioners' activities constituted a threat to the physical and emotional health of the patients. For example, because

[4] Petitioners have continued to blockade medical facilities in the District of Columbia and Maryland, and some of them have been held in contempt. National Organization for Women v. Operation Rescue, No. N89-3098 (D. Md. Nov. 15, 1990) (holding Operation Rescue, Project Rescue, Clifford Gannett, and Joseph Foreman in contempt for violating the court's November 9, 1989 preliminary injunction); National Organization for Women v. Operation Rescue, No. 89-2968-LFO (D.D.C. Jul. 30, 1990) (holding Operation Rescue, Project Rescue, Clifford Gannett, Joseph Foreman, Susan Odom, and Michael McMonagle in contempt).

some abortions require a two-stage procedure, patients must return to the facility for the second stage within a relatively short time frame or risk infection and other potentially serious complications. *Id.* at 1489, App. 21a. A blockade that closed the Hillview Women's Surgical Center in Maryland for most of the day stranded three women in the parking lot who needed this second-stage procedure. These women began to bleed and, like other women placed in life-threatening situations by petitioners' activities, suffered severe emotional trauma. *See id.*

The district court concluded that these activities violated state trespass and nuisance law as well as the constitutional right to travel of women seeking the services provided at the clinics. It further found that, absent an injunction, petitioners' unlawful activities would recur. *Id.* at 1496, App. 37a-38a.

The Fourth Circuit unanimously affirmed *per curiam*:

> "We affirm the judgment because the district court found that the activities of appellants in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law. *See* 726 F. Supp. at 1489, 1492-93. The legal premises under which the district court operated are also consistent with the law of the circuits. . . . [citations omitted]. . . . The Second Circuit has held under similar facts that blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel. *See New York NOW*, 886 F.2d at 1360-61.

* * *

> "In view of our disposition of the federal question raised by appellants we also decline to disturb the district court's refusal to dismiss the state law claims, and we uphold as well its award of costs and attorneys fees."

National Organization for Women v. *Operation Rescue*, 914 F.2d 582, 585-86, App. 8a-9a (4th Cir. 1990).

REASONS FOR DENYING THE WRIT

Petitioners are in effect simply seeking an advisory opinion on the scope of Section 1985(3) for, even if their arguments on this federal question were adopted, the outstanding injunction would remain in place since it is fully supported on independent state law grounds. Petitioners do not attack the merits of the lower court's resolution of the pendent state claims. They argue only that if the federal claim is now determined to lack merit, the district court should then exercise its discretion to reject pendent jurisdiction. However, there is nothing to suggest that the court would do so, and it is of course clear that the federal claim is of sufficient substance to support pendent jurisdiction.

Furthermore, even if intervention by this Court could affect the result in this case, which is doubtful at best, the Petition should nonetheless be denied because the federal questions presented satisfy none of the criteria of Rule 10 of this Court. There is no conflict between the circuits, and, as in *New York NOW*, there is no other basis for granting the writ.

I. THE RESULT BELOW RESTS ON UNCHALLENGED STATE LAW GROUNDS

The uncontroverted evidence presented at trial established, and the district court held, that petitioners violated state trespass and nuisance laws. Petitioners did not challenge the merits of these holdings on appeal and do not contest them here. Thus, if the district court had jurisdiction to decide these claims, intervention by this Court will not affect the result. Under "the ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available," *Hagans* v. *Lavine*, 415 U.S. 528, 546-47 (1974), there is no reason to review the federal questions presented by the Petition.

Petitioners erroneously assert that the Fourth Circuit "explicitly declined to reach petitioners' objection to the exercise of pendent jurisdiction over these claims." Petition for Writ of Certiorari ("Pet.") at 23. To the contrary, the Fourth Circuit's decision "not to disturb the district court's refusal to dismiss the state law claims" affirms the district court's decision to assume pendent jurisdiction over the state law claims. *NOW* v. *Operation Rescue*, 914 F.2d at 586, App. 9a.

Of course, in order properly to assume pendent jurisdiction, a court must determine that the federal questions raised in the complaint are "substantial" and that the state and federal law claims "derive from a common nucleus of operative fact." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Petitioners challenge only the district court's conclusion that respondents' federal claims are substantial.

This Court has repeatedly held that where a claim is not clearly foreclosed by existing precedent, it meets the substantiality requirement:

> "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

Hagans, 415 U.S. at 537-38 (quoting *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973)) (internal quotations omitted).[5]

Here, this test is easily met. *See Roe* v. *Operation Rescue*, 919 F.2d 857, ___ (3d Cir. 1990) (finding federal claims sufficient to support pendent jurisdiction on facts identical to this case). When this case was filed, the Second Circuit had recently found merit in a Section 1985(3) claim nearly identical to respondents' claim. *New York NOW*, 886 F.2d 1339. Moreover, district courts in Maryland and the District of Columbia contemporaneously with the district court below reached the same conclusion that respondents' federal claims were sufficiently substantial to support pendent jurisdiction. *National Organization for*

[5] *See also* Oneida Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974); Siler v. Louisville and Nashville Railroad Co., 213 U.S. 175, 193 (1909).

Women v. *Operation Rescue*, No. 89-3098 (D. Md. Nov. 9, 1989); *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989). Petitioners even admit that existing case law did not foreclose respondents' federal claims. Pet. at 16, 18, 21.

Now that evidence has been taken and the state law claims have been decided and are unchallenged on their merits, the district court's exercise of discretion to grant judgment on them is all but unassailable. *Cf. United Mine Workers*, 383 U.S. at 728 (upholding pendent jurisdiction where federal claims "ultimately failed" but the Court could not conclude "that the federal issues were so remote or played such a minor role at the trial that in effect the state claim only was tried").

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

The Fourth Circuit's holding that gender-based discrimination violates Section 1985(3) is in accord with that of every other circuit to consider the issue. *Stathos* v. *Bowden*, 728 F.2d 15, 20 (1st Cir. 1984); *New York State NOW* v. *Terry*, 886 F.2d 1339 (2d Cir. 1989); *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366 (1979); *Volk* v. *Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Conroy* v. *Conroy*, 575 F.2d 175, 177 (8th Cir. 1978); *Life Ins. Co. of N. Am.* v. *Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Long* v. *Laramie County Community College, Dist.*, 840 F.2d 743, 750-52 (10th Cir.), *cert. denied*, 109 S. Ct. 73 (1988); *see Browder* v. *Tipton*, 630 F.2d 1149, 1154 (6th Cir. 1980).

This Court has also effectively ruled that Section 1985(3) protects women. *Novotny* v. *Great American*

Federal Savings & Loan Ass'n, 442 U.S. 366 (1979). There, although the Court did not explicitly decide the issue, its lengthy discussion of the interplay between Title VII of the 1964 Civil Rights Act and Section 1985(3) would have been wholly unnecessary if women were not a protected class. In addition, a number of justices of the Court have stated that they believe Section 1985(3) extends to discrimination against women. *United Brotherhood of Carpenters & Joiners Union* v. *Scott*, 463 U.S. 825, 853 (1983) (Blackman, J., dissenting) (four justices recognized that sex based discrimination "*per se*" satisfies Section 1985(3)); *Novotny*, 442 U.S. at 389 n.6 (White, J., dissenting) (three justices agreed that the majority correctly assumed that "sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3) . . . . ").

Unable to cite a single case that holds that women are not a cognizable class for Section 1985(3) purposes, petitioners argue that the inquiry here is not whether women are a class, but whether their opposition to "women seeking abortion" satisfies the animus requirement of Section 1985(3). However, this is a meaningless distinction for it is clear that class animus is established by proof of violence limited to those members of the class who attempt to exercise a protected right that defendants oppose. *See, e.g.*, *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). For instance, a Section 1985(3) claim based on denial to blacks of the right to vote could not be defended on the ground that blocking access to the polls was directed, not at all blacks, but only at those who tried to vote. The Second Circuit has squarely rejected petitioners' argument:

> "In most cases of invidious discrimination, violations of constitutional rights occur only in response to the attempts of certain members of a class to *do* something that the perpetrators found objectionable, such as traveling interstate with the perceived purpose of promoting civil rights. *See, e.g., Griffin*, 403 U.S. at 90, 91 S. Ct. at 1792-93. It is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights, but not against class members whose actions do not offend them."

New York State NOW, 886 F.2d at 1359-60. Similarly, the Seventh Circuit has held that a Section 1985(3) plaintiff "need not prove that there was an agreement to discriminate against an entire class of women." *Volk*, 845 F.2d at 1434.

Petitioners are not able to cite any appellate decision that accepts their specious distinction. The only two appellate decisions on the merits cited by petitioners are both from the Fifth Circuit and involve different allegations and legal theories.[6] In *Roe*, the

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[6] Petitioners also cite two district court opinions that purportedly hold that women seeking abortion are not a cognizable class and/or that blockaders have no animus against them. One of these cases was affirmed by an equally divided Eighth Circuit, but it did not even involve protests, much less coercive blockades at a medical facility. Lewis v. Pearson Found., Inc., No. 87-894 C(2) (E.D. Mo. Jan. 15, 1988), *rev'd*, 908 F.2d 318 (8th Cir. 1990), *vacated by an equally divided court*, No. 88-1293 (8th Cir. Sep. 7, 1990) (*en banc*). The other case is currently on appeal to the Ninth Circuit. National Abortion Fed'n v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989). Absent a conflict, there

plaintiffs alleged that the defendants "threatened, harassed, intimidated and assaulted" a class of "persons who do not share the anti-abortion religious beliefs of the conspirators." *Roe* v. *Abortion Abolition Soc'y*, 811 F.2d 931, 932, 935-37 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987). The court held that a class simply defined as those persons who disagree with the defendants is not cognizable under Section 1985(3). In *Mississippi Women's Nat'l Medical Clinic* v. *McMillan*, 866 F.2d 788, 790, 794 (5th Cir. 1989), the plaintiffs alleged that the defendants "create[d] an 'atmosphere' that intimidate[d]" a class of "women of childbearing age who seek medical attention" at the plaintiff clinic. The divided court assumed that this grouping was a cognizable class, but held—over the dissent of Judge Wisdom—that the plaintiff had "not shown that the protestors acted with an invidious discriminatory *animus* against that particular class. Rather, the record indicates that the protestors do not target their pro-life advocacy at any particular group." *Id.* at 794.[7]

Neither of these two Fifth Circuit decisions dealt with the allegations presented in this case, and in *New York State NOW*, that petitioners' blockading of medical facilities discriminated against women as a

is no reason to prevent the courts of appeals from considering the issues in these cases on their merits.

[7] To the extent that *McMillan* held that there is no Section 1985(3) liability where defendants' animus extends beyond a recognizable class to those who help the class members, it is erroneous. When Congress enacted Section 1985(3), it explicitly stated that the statute was intended to protect not only members of a traditionally disfavored class but also those whose activities supported the rights of that class. *See, e.g.*, Cong. Globe, 42nd Cong., 1st Sess. 487, 511, 517 (Apr. 5, 1871).

class. The plaintiffs in the Fifth Circuit cases neither isolated coercive, physical activity nor alleged that women were the relevant class. *See, e.g.*, *McMillan*, 866 F.2d at 790 (plaintiffs sought to prevent picketing and use of offensive language). The present case simply does not involve "pro-life advocacy" that—as found by the majority in *McMillan*—could be directed at anyone. The orders below seek to prevent blockades that are specifically intended to prevent women from entering medical facilities and exercising their constitutional rights. Finally, as noted, this case is identical in all relevant respects to *New York State NOW*, in which this Court denied certiorari notwithstanding these two distinguishable Fifth Circuit decisions. 110 S. Ct. 2206.

A conflict does not exist whenever courts reach differing results in cases in which different claims are advanced and different evidence is presented. The Fourth Circuit, as did the Second, endorsed two principles respecting enforcement of Section 1985(3): women as a class are protected, and wrongful acts directed at those class members who exercise the right objected to establish discriminatory animus toward the entire class. Petitioners have not identified a single appellate decision that has addressed these issues and decided them differently.

III. PETITIONERS' ARGUMENTS IN SUPPORT OF GRANTING A WRIT OF CERTIORARI ARE UNAVAILING

The decision below is fully consistent with prior Section 1985(3) case law and is an appropriate and limited response to petitioners' refusal to remove undeniably illegal coercive blockading from their repertoire of anti-abortion activities. In contrast to *Carpenters Union*, where recognition of a Section

1985(3) class would have extended the statute to virtually any political or economic dispute (463 U.S. at 836, 838-39), the decision below simply applies the statute to women—a group that has been traditionally recognized as a class entitled to special protection under the Equal Protection Clause of the Fourteenth Amendment and under various civil rights laws—who are physically prevented from exercising their constitutional rights. *See supra* at 9-13. This scenario falls squarely within the recognized confines of Section 1985(3), and absent a conflict among the circuits, review by this Court is simply unnecessary.

Petitioners advance a number of reasons for granting their petition in the absence of a conflict between circuits. Pet. 12-22. None have merit. Their claim as to absence of proof of class-based animus, Pet. 15-18, rejected by both the Second and Fourth Circuits, has already been shown above to pose no issue warranting this Court's review.

Particularly in the light of *Griffin* v. *Breckenridge, supra*, there is certainly no reason for this Court to review the holding of the court below that interference with interstate travel is a federal right protected by Section 1985(3). "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union." *United States* v. *Guest*, 383 U.S. 745, 757 (1966). Where, as here, individuals physically prevent interstate travelers from procuring the services of a lawful business establishment, they "actually deter such [interstate] travel" and violate the Constitution. *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opin-

ion). Discrimination between in-state and out-of-state residents has never been required; it is enough that out-of-state travel is impeded. *See, e.g., Crandall* v. *Nevada*, 6 Wall. 35 (1868) (striking down a state law that applied to both residents and non-residents alike). Moreover, contrary to petitioners' assertions, the Fourth Circuit's holding would not transform any "mass picket" or "sit-in" in a border city into a constitutional violation. As the plain language of the opinion makes clear, such symbolic efforts to persuade, unlike the coercive blockades at issue here, would not violate the right to travel.[8] *NOW*, 914 F.2d at 585, App. 8a.

Finally, of course, there is obviously no reason for this Court to review the exercise by the district court of its discretion to assume jurisdiction over the state law claims. Pet. 21-22. The basic legal principle is long-established and understood, and every appellate court that has had to deal with pendent state claims based on petitioners' blockading has properly upheld the district court's decision to assert its jurisdiction over them.

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[8] Petitioners also criticize cases in which lower courts have recognized a federal right to intrastate travel. Pet. 21. The court below did not rely on these cases, and their soundness is therefore not at issue here.

CONCLUSION

The Petition sets forth no basis on which the Court should review a decision that is obviously supported by adequate independent state law grounds, and that resolves the federal issue consistently with decisions of this Court and other courts. The Petition should be denied.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

PARTIES

The parties are correctly set forth at page ii of the Petition for Writ of Certiorari.*

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* Respondents mistakenly assert that Petitioners omitted the Prince William Women's Clinic from the list of Respondents. *See* Brief for Respondents in Opposition at 2 n.2. On the contrary, Petitioners have included this entity. *See* Petition for Writ of Certiorari at ii.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-985

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO BRIEF IN OPPOSITION

The petition for certiorari in the case at bar raises the question of the applicability of the Ku Klux Klan Act, 42 U.S.C. § 1985(3), to anti-abortion activities. The petitioners submit the present reply brief pursuant to Supreme Court Rule 15.6.

I. THE DECISION BELOW DOES NOT REST UPON INDEPENDENT STATE GROUNDS.

Respondents assert that the decision below rests on independent state law grounds. Brief for Respondents in Opposition at 6-9. This is simply not true, as petition-

ers have already demonstrated. *See* Petition for Writ of Certiorari (Pet.) at 23-24. The court of appeals exclusively addressed the federal questions at issue. App. 8a-9a. *See* Questions #1-3, Pet. at i. Petitioners, moreover, have challenged the substantiality of respondents' federal claims for purposes of federal subject matter jurisdiction, a threshold requirement that state law grounds cannot satisfy. *See* Question #4, Pet. at i. Finally, the award of attorney's fees to respondents under 42 U.S.C. § 1988 would necessarily fall with the rejection of their federal cause of action, regardless of the merits of their claims under state law.[1] *See* Question #5, Pet. at i; *see also* Pet. at 24 (citing cases).

In short, the challenged judgment rests entirely on federal law.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The decision of the Fourth Circuit, in the case at bar, is in conflict with decisions in the Fifth and Eighth Circuits. *See* Pet. at 8-10. The decision below also conflicts with a decision by the Central District of California, an appeal from which is now pending before the Ninth Circuit. Pet. at 10-12. Indeed, the district court itself acknowledged, in the case at bar, the "lack of uniformity among courts" on the applicability of § 1985(3) to anti-abortion activities. App. 29a. Respondents have failed to explain away these conflicts.

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[1] As the Fifth Circuit recently reaffirmed, "a party who wins pendent state claims while *losing* all federal claims is not entitled to fees." *Heath v. Brown*, 807 F.2d 1229, 1233 (5th Cir. 1987) (per curiam) (emphasis in original). The Fourth Circuit is in agreement with this rule, *e.g.*, *Bunting v. City of Columbia*, 639 F.2d 1090, 1095 (4th Cir. 1981); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980), and no circuit has taken a contrary position, *see* Pet. at 24 (citing cases).

The Fifth Circuit has twice rejected attempts to characterize anti-abortion activities as violative of 42 U.S.C. § 1985(3). *See Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989). In *Roe*, the Fifth Circuit held that the asserted class against whom the anti-abortion defendants had allegedly discriminated—"persons who do not share Defendants' religious beliefs about abortions," 811 F.2d at 932-33—was not a cognizable class under § 1985(3), 811 F.2d at 935-37. And in *Mississippi Women's Medical Clinic*, the same court held that the desire to prevent *abortion* was not equivalent to a discriminatory animus against *women* (or women seeking abortions). 866 F.2d at 794, 797. The holding of the Fourth Circuit in the present case—that efforts to prevent abortion represent invidious discrimination, under § 1985(3), against "women seeking abortions"—is plainly incompatible with these Fifth Circuit precedents.

Respondents, apparently recognizing that the *Mississippi Women's* decision would bar relief to them under § 1985(3) in the case at bar, charge that this decision "is erroneous." Brief for Respondents in Opposition at 12 n.7. Whether or not the decision is erroneous—and petitioners maintain that the Fifth Circuit has correctly decided the relevant issues—the decision of the Fifth Circuit stands squarely in conflict with the decision of the Fourth Circuit in the case at bar.

In *Lewis v. Pearson Foundation, Inc.*, 917 F.2d 1077 (8th Cir. 1990) (en banc), the Eighth Circuit affirmed, by an equally divided court, a district court decision rejecting the use of § 1985(3) against opponents of abortion.[2] The district court had held that the asserted class

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[2] The district court decision is unpublished, but the original panel decision of the court of appeals describes the lower court's holding. *See Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318 (8th Cir. 1990), *vacated*, No. 88-1293 (8th Cir. Sept. 7, 1990) (en banc).

—"women seeking abortions"—was not cognizable under § 1985(3); the court had further held that sincere opposition to abortion did not satisfy the requirement of class-based discriminatory animus. Pet. at 10. The holding of the Fourth Circuit in the case at bar, by contrast, is that "women seeking abortions" form a valid class under § 1985(3), and that opposition to abortion *per se* satisfies the requirement, under § 1985(3), of an invidiously discriminatory animus. While *Lewis* involved a pro-life crisis pregnancy center, this fact is irrelevant: the legal theory of the class amimus claim was indistinguishable from that of respondents in the present case.[3]

III. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND UNSETTLED.

The petition for certiorari raises important questions about the limits of claims under § 1985(3). Pet. at 12-22. Respondents' assertion that review of these questions is "unnecessary" is simply a thinly veiled expression of disagreement with the merits of petitioners' arguments. *See* Brief for Respondents in Opposition at 14-15. This, of course, is not a reason for denying review.

Nor can respondents seriously deny the importance of the questions presented. Lawsuits using § 1985(3) against anti-abortion individuals have arisen in almost every federal geographical circuit. Pet. at 13 n.4 (listing seventeen cases in nine different circuits). Section 1985(3) is thus the principal means by which abortion facilities are invoking federal jurisdiction over what would otherwise be trespass suits under state law. *See* App. 46a (decision of district court awarding attorney

[3] Respondents do not even attempt to deny that the decision below conflicts directly with *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990). In that case the district court held that "women seeking abortions" was not a proper class under § 1985(3). *See* 721 F. Supp. at 1171-72.

fees) (present case "was, essentially, a simple trespass action . . ."). There is, therefore, a clear need for this Court to rule upon the applicability of the Ku Klux Klan Act to efforts of private individuals to prevent human abortion.

The court of appeals, moreover, has expanded § 1985(3) far beyond the scope previously countenanced by this Court.

A. Class-based animus

This Court has construed § 1985(3) to require proof of a "class-based, invidiously discriminatory animus behind the conspirators' action." *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 834 (1983) (quoting *Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971)). The decision below rests on two faulty premises: that "women seeking abortion" form a valid class under § 1985(3), and that opposition to abortion is the *per se* legal equivalent of "animus" against women. Pet. at 15-18.

Respondents claim that opposition to "women seeking abortion" is gender-based discrimination in the same way that opposition to blacks seeking to vote is racial discrimination. Brief for Respondents in Opposition at 10-11. Regardless of the merits of this hypothetical analogy, the comparison is inapposite. Respondents have neither alleged nor proven that petitioners—one of whom is a woman—were motivated by the slightest degree of hostility toward women. Pet. at 5. On the contrary, the courts below recognized the undisputed fact that petitioners are motivated by a fundamental concern for the "innocent victims" of abortion, i.e., unborn children, App. 20a (district court opinion) (quoting literature of petitioner Operation Rescue); *see also* App. 5a (court of appeals) (petitioners "are persons who oppose abortion").

The "animus" of petitioners, then, is sincere opposition to abortion. This is an "animus" against an *activity*, not

against a *class*. For example, if a group of monarchists were to block access to a polling place out of sincere opposition to democratic voting, they would possess an "animus" against *voting*, not against "blacks seeking to vote" or "women seeking to vote." This would be so despite the fact that the blockade hindered voting attempts by blacks and women: "Congress wanted to evaluate 'class-based invidious discrimination' through the lens of 'animus or motivation,' not impact." *Mississippi Women's Medical Clinic*, 866 F.2d at 794 (lead opinion of Judge Gee) (citing *Scott*, 463 U.S. at 834-35).

The court below, in essence, has erroneously converted opposition to an action—abortion—into opposition to a class—women or "women seeking abortions." In so doing, the court below negated the statutory requirement of a distinct, class-based animus.

B. Right to interstate travel

This Court has also established that § 1985(3) provides no substantive rights itself, but only vindicates rights found elsewhere. *Scott*, 463 U.S. at 833. In the present case, respondents claim that interference by private parties with access to an abortion facility constitutes infringement of a federal constitutional right to interstate travel simply because some patrons come from across state lines. The court of appeals accepted this outlandish expansion of the right to travel as a proper basis for invoking § 1985(3). Pet. at 18-21.

Respondents claim that the federal constitutional right to travel forbids any conduct, official or private, by which "out-of-state travel is impeded." Brief for Respondents in Opposition at 15. This has never been the law. Indeed, such a principle would make a constitutional tort or a civil rights violation out of any false arrest or even the most petty tortious obstruction of passage, whenever the plaintiff happened to be from another jurisdiction. Yet that, in effect, was the holding of the court below.

Respondents attempt to manufacture limits on the holding of the court of appeals by postulating a distinction between "coercive" sit-ins by opponents of abortion and merely "symbolic" or "persuasive" sit-ins by opponents of, say, apartheid, CIA recruiting, or the war in the Persian Gulf. Brief for Respondents in Opposition at 15. Merely to state this absurd and discriminatory theory is to refute it.

A fair reading of the prior decisions of this Court would foreclose respondents' bizarre claim under § 1985(3). Nevertheless, the Fourth Circuit—like the Second Circuit[4] and various district courts, *see* Pet. at 13 n.4—has endorsed respondents' federal cause of action. The substantial departure of the court below from a proper interpretation of the class animus requirement of § 1985(3), as well as the court's drastic expansion of the federal constitutional right to travel, call for review by this Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Writ of Certiorari, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case at bar.

Respectfully submitted,

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FEBRUARY 1, 1991

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[4] *See New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

Supreme Court, U.S.
FILED
APR 9 1991
OFFICE OF THE CLERK

No. 90-985

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JAYNE BRAY, *et al.*,
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v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 18, 1990
CERTIORARI GRANTED FEBRUARY 25, 1991

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The following items are reproduced in the Appendix to the Petition for Writ of Certiorari:

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Opinion, U.S. Court of Appeals for the Fourth Circuit (Sept. 19, 1990)	1a
Permanent Injunction, U.S. District Court for the Eastern District of Virginia (Nov. 22, 1989)	10a
Findings of Fact and Conclusions of Law, U.S. District Court for the Eastern District of Virginia (Dec. 6, 1989)	14a
Order, U.S. District Court for the Eastern District of Virginia (Feb. 13, 1990) (awarding fees)	43a
Injunction, U.S. District Court for the Eastern District of Virginia (Sept. 21, 1990) (extending injunction to Sept. 24, 1991)	57a

RELEVANT DOCKET ENTRIES

I. U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Date	Proceedings
11/8/89	Complaint filed.
11/8/89	Motion for TRO & Expedited Hearing filed by Pltfs.
11/8/89	Application for Preliminary Injunction (PI) & Expedited Hearing filed by Pltfs.
11/8/89	Memorandum in Support of Application for PI filed by Pltfs.
11/8/89	Exhibits to Memorandum in Support of Application for PI filed by Pltfs.
11/9/89	Amended Complaint filed.
11/9/89	Trial Proceedings (hearing on TRO).
11/9/89	Order granting TRO.
11/16/89	Trial Proceedings.
11/16/89	Order extending TRO.
11/20/89	Trial Proceedings (continuation of hearing of 9/16/89); Judgment granting PI with some limitations, order to be entered.
11/22/89	Permanent Injunction entered and filed.
12/4/89	Application for Attorneys' Fees and Costs filed by Pltfs.
12/6/89	Findings of Fact and Conclusions of Law filed.
12/20/89	Notice of Appeal of Order of 11/20/89 filed by Defts.
12/29/89	Notice of Cross-Appeal filed by Pltfs.
1/11/90	Amended Notice of Cross-Appeal filed by Pltfs.
2/13/90	Order that Defts pay Pltfs attorney fees and costs entered and filed.

Date	Proceedings
3/15/90	Notice of Appeal of Order of 2/13/90 filed by Defts.
7/6/90	Motion for Extension and Modification of Permanent Injunction filed by Pltfs.
7/31/90	Injunction order (extending duration of injunction)
9/21/90	Injunction order (extending duration of injunction)
II. U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT	
3/20/90	Order consolidating appeal of Defts (12/20/89), cross-appeal of Pltfs (12/29/89), and additional appeal of Defts (3/15/90).
7/18/90	Oral Argument.
9/19/90	Opinion affirming judgment of district court.
10/10/90	Mandate issued.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 89-1558-A

NATIONAL ORGANIZATION FOR WOMEN
1000 16th Street, N.W., Suite 700
Washington, D.C. 20036

and

51ST STATE NATIONAL ORGANIZATION FOR WOMEN
3104 18th Street, N.W.
Washington, D.C. 20010

and

MARYLAND NATIONAL ORGANIZATION FOR WOMEN
P.O. Box 451
Columbia, Maryland 21045

and

VIRGINIA NATIONAL ORGANIZATION FOR WOMEN
P.O. Box 3244
Arlington, Virginia 22203

and

PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, D.C., INC.
1108 Sixteenth Street, N.W.
Washington, D.C. 20036

and

NATIONAL ABORTION FEDERATION
1436 U Street, N.W.
Washington, D.C.

and

COMMONWEALTH WOMEN'S CLINIC
916 West Broad Street
Falls Church, Virginia 22046

and

NOVA WOMEN'S MEDICAL CENTER
9900 Main Street, Suite 305
Fairfax, Virginia 22030

and

ALEXANDRIA WOMEN'S HEALTH CLINIC
101 South Whiting Street
Landmark
Alexandria, Virginia 22304

and

PRINCE WILLIAM WOMEN'S CLINIC
9384-C Forestwood Lane
Manassas, Virginia 22110

and

GYNECARE ASSOCIATES
312 South Washington Street
Alexandria, Virginia 22314

and

METRO MEDICAL CENTER, INC.
d/b/a Annandale Women's Center
2871 Duke Street
Alexandria, Virginia 22314

and

CAPITOL WOMEN'S CENTER, INC.
1339 22nd Street, N.W.
Washington, D.C. 20037

and

HILLCREST WOMEN'S SURGI-CENTER
7603 Georgia Avenue, N.W.
Washington, D.C. 20012

and

METROPOLITAN FAMILY PLANNING INSTITUTE
5915 Greenbelt Road
College Park, Maryland 20705

Plaintiffs,

v.

OPERATION RESCUE
234 Chenango Street
Binghamton, New York 13901

and

PROJECT RESCUE
12106 Forge Lane
Bowie, Maryland
or
P.O. Box 550
Bowie, Maryland 20715

and

THE D.C. PROJECT
17 D Street, S.E.
Washington, D.C. 20003
(202) 543-8971

and

VETERANS CAMPAIGN FOR LIFE
Street address unknown
Washington, D.C.
(202) 543-8971

and

RANDALL TERRY
Fulton County Correctional Facility
410 South Main Street
Alpharetta, Georgia 30201

and

PATRICK MAHONEY
17 D Street S.E.
Washington, D.C. 20003

and

CLIFFORD GANNETT
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Bowie, Maryland

and

MICHAEL MCMONAGLE
247 Keswick Avenue
Glenside, Pennsylvania 19038

and

MICHAEL BRAY
2927 Tarragor Lane
Bowie, Maryland

and

JANE BRAY
2927 Tarragon Lane
Bowie, Maryland

Defendants.

AMENDED COMPLAINT

Preliminary Statement

1. This is an action for declaratory and injunctive relief in order to stop operations variously known as "Operation Rescue," "Project Rescue," the "D.C. Project," and "Veterans' Campaign for Life," which threaten the health and safety of women seeking abortions or other family planning services in the Washington Metropolitan area and elsewhere. In particular, defendants, and others acting in concert and participation with them, intend to blockade and harass family planning clinics and abortion providers, and to intimidate, harass and restrain women attempting to use the services of such clinics. Plaintiffs, including clinics as well as organizations representing affected women, seek a limited injunction in order to prevent these so-called "rescue" operations which unlawfully

interfere with their right to obtain and provide abortions and other medical services.

2. Defendants' blockades of clinics, which have occurred repeatedly in the past, are scheduled to resume in the Washington Metropolitan area beginning on or about November 10, 1989. Defendants' actions will greatly increase the health risks faced by women seeking counseling, abortions, and other medical services in the targeted facilities and will also irreparably injure the plaintiff clinics.

Jurisdiction and Venue

3. This Court has jurisdiction of the subject matter of this action under 28 U.S.C. § 1331 in that plaintiffs allege violations of federal law. In addition, jurisdiction is proper under 42 U.S.C. § 1985(3), 28 U.S.C. § 1343, and the doctrine of pendent jurisdiction.

4. Venue in this District is proper under 28 U.S.C. § 1391(b).

Parties—Plaintiffs

5. Plaintiff National Organization for Women is a membership organization with 250,000 members nationwide, and offices at 1000 Sixteenth Street, N.W., Suite 700, Washington, D.C. 20036. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the Washington Metropolitan area and throughout the United States.

6. Plaintiff 51st State National Organization for Women is a membership organization, located at 3104 18th Street, N.W., Washington, D.C. 20010. It sues on behalf of itself and its members, who include women residing in the District of Columbia who will need to use abortion and family planning clinics in the Washington Metropolitan area.

7. Plaintiff Maryland National Organization for Women is a membership organization, whose mailing address is P.O. Box 451, Columbia, Maryland 21045. It

sues on behalf of itself and its members, including women residing in Maryland who will need to use abortion and family planning clinics in the Washington Metropolitan area.

8. Plaintiff Virginia National Organization for Women is a membership organization, whose mailing address is P.O. Box 3244, Arlington, Virginia 22203. It sues on behalf of itself and its members, including women residing in Virginia who will need to use abortion and family planning clinics in the Washington Metropolitan area.

9. Plaintiff Planned Parenthood of Metropolitan Washington, D.C., Inc. ("PPMW"), located at 1108 16th Street, N.W., Washington, D.C. 20036, is a not-for-profit corporation organized under the laws of the District of Columbia. PPMW operates eight family planning clinics in the Washington Metropolitan area. Abortion services are provided at two of these clinics: Planned Parenthood Clinic located at 1701 Q Street, N.W., Washington, D.C. 20009, and Planned Parenthood Clinic located at 8605 Cameron Street, Suite 204, Silver Spring, Maryland 20910. These clinics provide abortions and other family planning and gynecological care to residents of the Washington Metropolitan area. Family planning and gynecological care, including abortion counseling and referral as appropriate, are provided to residents of the Washington Metropolitan area at these clinics: Planned Parenthood Clinic located at 5622 Columbia Pike, Suite 303, Falls Church, Virginia 22041; Planned Parenthood Clinic located at 10875 Main Street, Suite 208, Fairfax, Virginia 22030; Planned Parenthood Clinic located at 1108 16th Street, N.W., Washington, D.C. 20036; Planned Parenthood Clinic located at 2811 Pennsylvania Avenue, S.E., Washington, D.C. 20020; Planned Parenthood Clinic located at 4701 Randolph Road, Suite 209, Rockville, Maryland 20852; and Planned Parenthood Clinic located at Landover Mall, East Tower, Suite 203, Landover, Maryland 20785.

10. Plaintiff National Abortion Federation, located at 1436 U Street, N.W., Washington, D.C., is a not-for-profit professional association of abortion and other reproductive health services providers. Its members include more than 260 abortion clinics, operating in 45 states, the District of Columbia, and the Commonwealth of Puerto Rico, as well as individual physicians who provide abortion services.

11. Plaintiff Capitol Women's Clinic, Inc., located at 1339 22nd Street, N.W., Washington, D.C. 20037, is a health care provider that provides abortions and other family planning and gynecological care to residents of the Washington Metropolitan area.

12. Plaintiff Commonwealth Women's Clinic, located at 916 W. Broad Street, Falls Church, Virginia 22046, is a health care provider that provides abortions and other family planning and gynecological care to residents of the Washington Metropolitan area.

13. Plaintiff NOVA Women's Medical Center, located at 9900 Maine Street, Suite 305, Fairfax, Virginia 22030, is a health care provider that provides abortions and other family planning and gynecological care to residents of the Washington Metropolitan area.

14. Plaintiff Alexandria Women's Health Clinic, located at 101 South Whiting Street, Landmark, Alexandria, Virginia 22304, is a health care provider that provides abortions and other family planning and gynecological care to residents of the Washington Metropolitan area.

15. Plaintiff Prince William Women's Clinic, located at 9384-C Forestwood Lane, Manassas, Virginia 22110 is a health care provider that provides abortions and other family planning and gynecological care to residents of the Washington Metropolitan area.

16. Plaintiff Gynecare Associates, located at 312 South Washington Street, Alexandria, Virginia 22314, is a

health care provider that provides abortions and other family planning and gynecological care to residents of the Washington Metropolitan area.

17. Plaintiff Hillcrest Women's Surgi-Center, located at 3233 Pennsylvania Avenue, S.E., Washington, D.C. 20020, and at 7603 Georgia Avenue, N.W., Washington, D.C. 20012, is a health care provider that provides abortions and other family planning and gynecological care to residents of the Washington Metropolitan area.

18. Plaintiff Metropolitan Family Planning Institute, located at 5915 Greenbelt Road, College Park, Maryland 20705, is a health care provider that provides abortions and other family planning and gynecological care to residents of the Washington Metropolitan area.

Parties—Defendants

15. Defendant Operation Rescue is an unincorporated association with offices at 234 Chenengo Street, Binghamton, New York and elsewhere, and D.C. telephone number (202) 543-8971, whose purpose is to organize and coordinate disruptions of abortion and family planning facilities, including past and future blockades in the Washington Metropolitan area. Operation Rescue refers to its actions as so-called "rescues." Defendant trains individuals to perform "rescues" and renders assistance and resources to "rescues" throughout the United States and Canada.

16. Defendant Project Rescue is an unincorporated association affiliated with Operation Rescue, and is organizing and coordinating disruptions of abortion and family planning facilities planned in the Washington Metropolitan area. Project Rescue is located at 12106 Forge Lane, Bowie, Maryland. Its mailing address is P.O. Box 550, Bowie, Maryland 20715. It has D.C. telephone number (202) 543-8971.

17. Defendant The D.C. Project is an unincorporated association affiliated with Operation Rescue, and is organizing and coordinating disruptions of abortion and family planning facilities planned in the Washington Metropolitan area. Defendant The D.C. Project has D.C. telephone number (202) 543-8971.

18. Defendant The Veterans Campaign for Life is an unincorporated association affiliated with Operation Rescue, and is organizing and coordinating disruptions of abortion and family planning facilities on or about Veterans Day weekend, November 10-12, 1989, in the Washington Metropolitan area. Defendant The Veterans Campaign for Life has D.C. telephone number (202) 543-8971.

19. Defendant Randall Terry is the National Director of defendant Operation Rescue. He is currently incarcerated at the Fulton County Correctional Facility, 410 South Main Street, Alpharetta, Georgia 30201, for unlawful activities in connection with Operation Rescue. Defendant Terry has been involved in organizing and coordinating activities planned by defendants for the Washington Metropolitan area.

20. Defendant Patrick Mahoney is a paid staff member of Operation Rescue, and is organizing and coordinating Washington Metrpolitan area activities for the D.C. Project and other defendants. On information and belief, he currently resides at 2927 Tarragon Lane, Bowie, Maryland.

21. Defendant Clifford Gannett is director of Project Rescue, and is organizing and coordinating activities planned by defendants for the Washington Metropolitan area. On information and belief, he resides at 12106 Forge Lane, Bowie, Maryland.

22. Defendant Michael McMonagle works at Operation Rescue with Terry Randall, has organized and coordinated

activities at Operation Rescue, and is organizing and coordinating activities planned by defendants for the Washington Metropolitan area. On information and belief, he resides at 247 Keswick Avenue, Glenside, Pennsylvania.

23. Defendant Michael Bray has organized and coordinated activities for Operation Rescue, and is organizing and coordinating activities planned by defendants for the Washington Metropolitan area. On information and belief, he resides at 2927 Tarragon Lane, Bowie, Maryland.

24. Defendant Jane Bray is organizing and coordinating activities planned by defendants for the Washington Metropolitan area, including meetings at the D.C. Armory on or around November 15-17, 1989.

25. Each defendant individual is sued in his or her individual capacity and as an officer or managing agent of each of the defendant organizations. Plaintiffs aver, on information and belief, that defendants are interacting closely in organizing and coordinating the unlawful conduct alleged herein. Plaintiffs are unable further to specify the interrelation and membership of the defendant individuals and defendant organizations because, upon information and belief, defendants have conspired to conceal this information.

Facts

26. Defendant Operation Rescue and the defendant individuals, pursuant to an ongoing conspiracy, have engaged in unlawful actions against clinics providing abortion services and against women seeking to use these clinics. Defendants have referred to their actions as so-called "rescues", and to the groups planning these "rescues" by various names, including "Operation Rescue."

27. The unlawful "rescues" organized and engaged in by Operation Rescue and by the defendant individuals,

in the Washington Metropolitan area and elsewhere, have obstructed and closed down clinics where abortions are performed through a variety of tortious means, including trespassing on, sitting in, blocking, and impeding and obstructing entrance to and exit from, and access to and from, such facilities, and have impeded public passage on the sidewalks and streets around such facilities. These defendants also have intimidated and harassed patients and employees of the clinics and have subjected them to severe emotional distress, staged disruptive protests, destroyed property, and otherwise disrupted and interfered with the medical and business operations of these facilities.

28. Defendant individuals have a track record of unlawful activity in connection with their so-called "rescues." The lawbreaking activity of these defendants, and of others acting in concert and participation with them, has been enjoined in New York, Pennsylvania, Connecticut, Washington State, and California.

29. In addition, thousands of individuals, including some of the defendant individuals, have been convicted of criminal offenses for their illegal actions at "rescues" in the Washington Metropolitan area and elsewhere throughout the country. During the past year, over five hundred arrests have occurred as a result of "rescues" at plaintiff Hillcrest Women's Surgi-Center in D.C. and at plaintiff Commonwealth Women's Clinic in Virgina.

30. Defendants intend to resume these "rescues" in the Washington Metropolitan area on or about November 10, 1989, and have organized themselves under names including "Operation Rescue," "Project Rescue," the "D.C. Project," and "Veterans' Campaign for Life." Upon information and belief, defendants in carrying out the Washington Metropolitan area "rescues" hope to be

joined by several thousand people from various parts of the country.

31. In a news conference held on August 3, 1989, in the District of Columbia, defendants announced their intent to resume activities in the Washington Metropolitan area. Defendants' published plans for the Washington Metropolitan area state explicitly that they intend to engage in "rescue missions," to "rescue those who are unjustly sentenced to death," and to "intervene to save babies scheduled to die in the Washington, D.C. area." Defendants' instructions to those acting in concert and participation with them acknowledge that they are likely to be arrested.

32. Defendants have not publicly stated which clinics in the Washington Metropolitan area they will target. On information and belief, defendants intend to keep this aspect of the "rescues" secret in order to frustrate attempts to protect and guarantee women's access to the clinics and providers.

33. Defendants' plans to disrupt the provision of gynecological medical services in the Washington Metropolitan area include the following actions to-date: defendants have distributed fliers inviting others to participate in rallies and training sessions—to learn how to perform the so-called "rescues"—beginning November 10, 1989. Specific dates have been earmarked to "take the training we have received and mak[e] it come alive "in the streets'." "Rescues" in the Washington Metropolitan area have been announced by defendants for November 11, 17, and 18, 1989. On information and belief, blockades have also been planned for November 29 and December 5, 1989, when the Supreme Court is scheduled to hear oral arguments in cases involving abortion-related issues, and on other dates between November 10 and December 10, 1989.

34. The "rescues" are intended to have and will have the effect of denying or disrupting women's access to the targeted clinics and providers with the intended result that many women will have to delay their scheduled services. Any delay in the provision of health services relating to childbirth and abortion may severely increase the health risks faced by the women affected.

35. Unless defendants' threatened and unlawful activities are immediately enjoined, substantial and irreparable damage will be done to plaintiffs' health and safety, and to their right to choose an abortion and to carry out that decision, as well as to the plaintiff clinics' rights to conduct their business.

36. Defendants intend to continue their so-called "rescues" in the future, both in the Metropolitan Washington area and elsewhere in the United States.

37. Plaintiffs have no adequate remedy at law.

First Cause of Action

42 U.S.C. § 1985(3)—Right to Travel

38. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 37 as if fully set forth herein.

39. Defendants have conspired with each other and other parties presently unknown for the purpose of denying women seeking abortions and other family planning and gynecological services at targeted facilities the equal protection of the laws and the privileges and immunities under the law, and have conspired to deprive women of their right to travel, in violation of 42 U.S.C. § 1985(3). Defendants are and continue to be motivated by an invidiously discriminatory animus directed at women, and at women who seek the services of providers of abortions and related services.

Second Cause of Action

42 U.S.C. § 1985(3)—Privacy Rights

40. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 37 as if fully set forth herein.

41. Defendants have conspired with each other and other parties presently unknown for the purpose of denying women seeking abortions at targeted facilities their rights to privacy, in violation of 42 U.S.C. § 1985(3). Defendants are and continue to be motivated by an invidiously discriminatory animus directed at women, and at women who seek the services of providers of abortions and related services.

Third Cause of Action

Trespass

42. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 37 as if fully set forth herein.

43. The actions taken and planned by defendants, jointly and individually, constitute an intentional tortious trespass on the targeted clinics and abortion providers, including the plaintiff clinics and abortion providers, in violation of D.C. Code § 22-3102 and Md. Code art. 27, § 577.

44. The actions taken and planned by defendants, jointly and individually, constitute an intentional tortious trespass on the targeted clinics and abortion providers, including the plaintiff clinics and abortion providers, after defendants have been forbidden from such action, in violation of Va. Code § 18.2-119.

45. The actions taken and planned by defendants, jointly and individually, constitute an intentional tortious trespass on the targeted clinics and abortion providers,

that will prevent the clinics and abortion providers, including the plaintiff clinics and abortion providers, from providing family planning, counseling, and medical services to women seeking such services, in violation of Va. Code § 18.2-120.

46. The actions taken and planned by defendants, jointly and individually, constitute an intentional tortious trespass on the targeted clinics and abortion providers that will interfere with the rights of clinics and abortion providers, including the plaintiff clinics and abortion providers, from providing family planning, counseling, and medical services to women seeking such services, in violation of Va. Code § 18.2-121.

47. The actions taken and planned by defendants, jointly and individually, constitute an intentional interference with access to and egress from targeted clinics and abortion providers, including the plaintiff clinics and abortion providers, in violation of Md. Code art. 27, § 577B.

Fourth Cause of Action

Tortious Interference with Business Relationships

48. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 37 as if fully set forth herein.

49. The actions taken and planned by defendants, jointly and individually, constitute an intentional tortious interference with the contractual and business relationships of the targeted clinics and abortion providers, including the plaintiff clinics and abortion providers, in violation of the common laws of the District of Columbia, Virginia, and Maryland.

Fifth Cause of Action

Public Nuisance

50. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 37 as if fully set forth herein.

51. The actions taken and planned by defendants, jointly and individually, constitute a public nuisance designed to, and having the effect of, endangering the public security, safety and welfare and interfering with the public's right to obtain medical services in violation of the common laws of the District of Columbia, Virginia and Maryland.

WHEREFORE plaintiffs request judgment as follows:

1. A declaration that the actions taken and planned by defendants violate plaintiffs' rights to obtain and provide abortions under the United States Constitution and the statutes and common law of the District of Columbia, Virginia, and Maryland.

2. Preliminary and permanent injunctive relief providing as follows:

a. That the defendants, their officers, directors, agents, and employees, and all organizations and persons acting in concert or participation with defendants who receive notice of the preliminary injunction (by personal service, by having it read to them, or otherwise) be enjoined and restrained in any manner, or by any means, from:

i. trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions, family planning, or gynecological services are provided in the Washington Metropolitan Area;

ii. harassing, intimidating or physically abusing persons entering, leaving, working at, or using any services at any facility at which abortions, family planning or gynecological services are provided in the Washingotn Metropolitan Area; Provided, however, that: (a) "sidewalk counseling," consisting of reasonably quiet conversation of a non-threatening nature by not more than two people with each person they are seeking to

counsel shall not be prohibited on public sidewalks; (b) no one is required to accept or listen to "sidewalk counseling" and should anyone decline such counseling, that person shall have the absolute right to leave or walk away without harassment, and (c) "sidewalk counseling" as defined herein shall not limit the right of the Police Department or the United States Marshal to maintain public order by reasonably necessary rules and regulations as they decide are necessary at any particular demonstration site;

iii. obstructing the work of the persons located in any facility at which abortions, family planning or gynecological services are provided in the Washington Metropolitan Area by producing noise by any means—including singing, chanting, yelling, shouting, or screaming—that substantially interferes with the provision of medical services, including counseling, within any such facility; and

iv. inducing, encouraging, or directing others to take any of the actions described in paragraphs i.-iii. above.

b. That defendant organizations and their officers, and defendant individuals, be directed to inform all persons who assemble to participate in any "rescue" demonstration, or similar action in concert or participation with defendants of the existence and contents of the preliminary injunction governing the behaviors specified in paragraphs i.-iv. above;

c. That nothing in the Preliminary Injunction shall be construed to limit exercise of legitimate First Amendment rights;

d. That a contempt penalty of $25,000 per day for the first violation of the Order be imposed on each defendant,

each officer, director, agent or employee of defendants, and each person acting in concert or participation with defendants with notice of this Preliminary Injunction, who violates the terms of this Preliminary Injunction and whose contempt is proven;

e. That each successive violation of this Order subject the contemnor to a civil contempt fine double that of the previous fine;

f. That any amounts collected under a judgment of contempt be paid into the Registry of the Court to be disbursed by further Order of the Court; and

g. That each contemnor be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of the Preliminary Injunction.

3. Awarding costs to plaintiffs.

4. The grant of such other further relief as may be appropriate, just and proper.

Respectfully submitted,

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Dated: November 9, 1989

U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

(Title Omitted in Printing)

PLAINTIFFS' TRIAL EXHIBIT 1 (excerpt)

WHAT ARE "RESCUE MISSIONS?"

Rescue missions are heroic attempts by God-fearing people to save babies and mothers from abortion on a *particular day*, by *peacefully, but physically* blockading abortion mills with their bodies, to intervene between abortionists and the innocent victims. Many children in America are alive today because of these efforts. Rescuers are usually arrested, charged with a minor infraction, such as trespassing or disorderly conduct, and released the same day.

PLAINTIFFS' TRIAL EXHIBIT 7 (excerpt)

I am tired of listening to my sisters in the National Organization for Women accuse me of violence. I have been in the leadership of Operation Rescue from the beginning. I have been in the forefront of a movement which has led 20,000 women like me to risk imprisonment in this country. Our crime? We try to protect the 800,000 women whom the N.O.W. wants to see butchered in their own mothers' wombs.

The National Organization for Women claims to represent women, but they are not even the 10th largest women's organization in the country. They are a tiny minority which has the arrogance to accuse us of violence while they tell hundreds of thousands of women each year to massacre their daughters—our sisters—in their wombs. We are not the violent ones.

I have defended our non-violent track record many times to skeptics, but let me state it again:

—since May of 1988, 50,000 people have risked arrest in America, 20,000 of them women

—There have been no acts of violence on our part. I know; I have been involved since the beginning.

—We have remained passive while N.O.W. and their beligerant henchmen have physically assaulted peaceful rescuers sitting on the ground. I myself have been assaulted by *men* doing N.O.W.'s dirty work

U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

(Title Omitted in Printing)

PLAINTIFFS' TRIAL EXHIBIT 12

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 89-2968-LFO

NOW, *et al.*,
Plaintiffs,

v.

OPERATION RESCUE, *et al.*,
Defendants.

AFFIDAVIT OF RANDALL A. TERRY

I, RANDALL A. TERRY, being first duly sworn state

1. I am a defendant in the above-captioned matter.

2. I am resident of Binghampton, New York, although I currently reside in the Fulton County Correctional and Rehabilitation Facility, Fulton County, Georgia.

3. Nothing could be further from the truth than a claim that I act with an invidiously discriminatory animus toward women, generally, or toward abortion-bound women, particularly. Jesus did not condemn the

woman at the well. As a follower of Jesus Christ, I do not have the luxury of condemning others who share my common human frailties.

4. My abortion-related protest activities have nothing to do with hatred for any woman or a desire to treat any woman or grouping of woman in a discriminatory fashion. Rather, rescue is a form of repentance for my personal failures that led to abortion on demand in this country, and that permit abortion on demand to continue in this country.

5. The common name for the religiously motivated social movement about which Plaintiffs are complaining, Rescue, is taken from the Holy Bible, the Book of Proverbs 24:11-12, wherein the Lord God commands us to rescue those who are being dragged to their death.

6. When I have participated in abortuary blockades in the past, I have never acted in a way fairly described as discriminatory toward women or abortion-bound women. Instead, while the child-killing facility is blockaded, no one is permitted to enter past the rescuers. Neither women nor men. Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women —all are prevented from *entering* the abortuary while the rescue is in progress. This approach may be many things but it is not discriminatory in any respect complained of by the businessmen-abortionists and the other Plaintiffs in this case.

7. Because I have been accused of acting in an invidiously discriminatory fashion toward women, generally, and toward abortion-bound women, in particular, I believe the Court should be apprised of the truth testified to by my life:

a. I am married and a father of daughters; I love these very important women in my life and

have never been accused of treating them in an invidiously discriminatory fashion;

b. Together with my wife, I founded and ran The Crisis Pregnancy Center, in Binghampton, New York. When it became necessary to turn management of that charitable endeavor over to another, I was responsible for placing the Center's management in the hands of a woman, who was the best person for the task. Neither in running that Center, or in the process of turning control over to another, have I been accused of acting in an invidiously discriminatory manner toward women or abortion-bound women.

c. Operation Rescue, of Binghampton, New York, employs several women, including in the key position of press secretary. I was responsible for the hiring for these positions. In my personnel relationships at Operation Rescue, I have never been accused of acting in an invidiously discriminatory manner toward women or abortion-bound women.

d. In the Church of which I am member, I am an elder and their are presently women deacons. In my church relationships, I have never been accused of acting in an invidiously discriminatory manner toward women or abortion-bound women.

8. My commitment to helping abortion-bound women and my concern for them has taken many forms. I helped to organize a system of shepherding homes where unwed mothers could live when turned out of their family homes. I have transported women to the medical appointments. I even took one girl who changed her mind about aborting her baby to the hospital for her delivery, and I stayed by her side until it was time for her cesarean delivery. I have spent hours upon hours

counseling pregnant women, even at home during times I should have spent with my family.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Randall A. Terry
RANDALL A. TERRY

(Notarization Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISRICT OF VIRGINIA
Alexandria Division

(Title Omitted in Printing)

ORAL OPINION OF THE DISTRICT COURT

(Excerpt of Trial Transcript)

Before:

THE HONORABLE T.S. ELLIS, III, Presiding
United States District Court Judge

APPEARANCES:

For the Plaintiffs:

John Schafer, Esq.
Pamela Passman, Esq.

For the Defendants:

Doug Davis, Esq.

* * * *

[B-86] THE COURT: The matter comes before the Court on the plaintiffs' application for a permanent injunction to enjoin the defendants from, among other things, physically impeding access to or egress from, the premises where the plaintiffs either seek to obtain or render legal abortion services and related medical advice.

And the Court is going to state now its findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure. But I will reduce them to writing and will amplify them in the writing.

At the outset—I'll state this again at the end. But at the outset before turning to the findings of fact and conclusions, let me state that nothing in the order of the Court and nothing in these facts, findings of facts and conclusions is intended to or should be taken as intimating any view that this Court might have with respect to the legality or morality of abortion or otherwise. It has nothing to do with that except, of course, incidentally, as the parties involved have that as the root [B-87] cause of that disagreement. But that's not the issue presented to the Court in this case. And this case doesn't require the Court and the Court does not intend to, nor does it, express any view as to that issue.

The Court does have jurisdiction and venue in this case. Plaintiffs allege violations of 42 U.S.C. 1985(3) and, therefore, the Court has jurisdiction over the subject matter of this action pursuant to 1331 and 1343 of the United States Code. And the state claims, the Court has jurisdiction of the state causes of action under the doctrine of pendent jurisdiction under *United Mine Workers against Gibbs.* Venue is proper under 1391(b).

The proceedings to date are, briefly summarized, the plaintiffs came before the Court on November 8th seeking a temporary restraining order. The plaintiffs appeared by counsel. And the defendants, having received, apparently, actual notice, also appeared by counsel. The matter was argued. Defendants' counsel accepted service on behalf of the defendants. At the conclusion of oral argument, the Court issued a temporary restraining order and also, without objection of the parties, expedited the merits to be heard with the application for a preliminary injunction.

Now, the TRO that the Court entered was to expire on Saturday, November 18th, before the Court could complete [B-88] the hearing on the merits. And accordingly, for that reason, for good cause shown, and pursuant to 65(b), Federal Rules of Civil Procedure, the Court extended the TRO for an additional ten days. The Court has held a two-day trial on the merits of this action on November 16th and today, November 20th.

Plaintiffs presented testimony from nine witnesses and introduced a number of exhibits.

Let me have the list of exhibits, please.

The exhibits admitted were Exhibit 1; 3; 4; 5; 6; 7; 8; 9; 10; 11; 12; 13, which is one-page "Project Rescue"; and 14, two pages of "Project Rescue"; 16; 17 and 18.

All right. The parties in this matter: The plaintiff organizations—that is, the National Organization for Women, Maryland National Organization, Virginia National Organization, and the Fifty-First State National Organization, all National Organization for Women affiliates, and the Planned Parenthood of Metropolitan Washington are membership organizations. And one of their membership goals or purposes is the establishment or preservation of rights, if any, that women may have to seek and obtain abortions. They sue here on behalf of their members, who include women who will need to use abortion and family-planning clinics in the Eastern District of [B-89] Virginia or Nor'hern Virginia.

The National Association—the National Abortion Federation plaintiff—Mr. Schafer, I'm not sure we heard any evidence on them. Did we?

MR. SCHAFER: They represent, Your Honor, individual clinics. But I think you're right that there was no actual evidence submitted on that organization.

THE COURT: All right. Are they a necessary plaintiff in this matter?

MR. SCHAFER: No, they are not.

THE COURT: All right. Then the individual plaintiffs, clinic plaintiffs, are a number of clinics in the Washington metropolitan area that the Court heard evidence on: some in Northern Virginia, some in the District of Columbia and some in Maryland. These provide pregnancy terminations, or abortions, family planning and gynecological care to women, many of whom come from other states to obtain these services.

The defendants in this matter are comprised of one organization and six individuals. The organization is entitled "Operation Rescue," which is apparently an unincorporated association, whose membership opposes abortion and whose purpose, purposes include the organization and coordination of disruptive, of disruptions of abortion and family-planning facilities in the [B-90] Washington metropolitan area.

The individuals: Defendant Randall Terry is the national director of Operation Rescue and, although currently incarcerated in Fulton County Correctional Facility, he is, nonetheless, it is quite plain to this Court, still involved in the direction of the activities of Operation Rescue. Indeed, counsel for defendants indicated as much in their representations to the Court.

Defendant Patrick Mahoney is a paid consultant to Operation Rescue. And from the evidence adduced here in court, he is present at activities of Operation Rescue where blockades of clinics occur.

Operation Rescue refers to actions of its members in blockading clinics as "rescues." And Operation Rescue trains individuals to perform rescues, as so defined, and renders assistance and resources to rescuers—at least throughout the Washington metropolitan area and, it would appear, throughout the country.

Defendant Clifford Gannett, or Ga-nay [phonetic], is director of Project Rescue, which is one of the activities planned by Operation Rescue in this area. And it would appear from the record that Mr. Gannett organizes and coordinates activites in the Washington metropolitan area for the Operation Rescue.

Defendant Michael McMonagle works as well with [B-91] Operation Rescue. And it would appear from the record that he, too, organizes and coordinates activities in the metropolitan Washington area for Operation Rescue and the other individual defendants. And the same essentially is true for Michael Bray and Jayne Bray, Jayne Bray having been involved, according to the testimony in this case, in rescues or blockades in this metropolitan area.

There are a total of five causes of action alleged. There are two federal causes of action alleged under 42 U.S.C. 1985(3), the first being a conspiracy to deprive women seeking to use the clinics of their right to free and unhindered interstate travel, and, secondly, the conspiracy to deprive women seeking the services of these clinics from their right, if any exists, to obtain an abortion.

Let me address the first one. First, the Court finds that the defendants have engaged in a combination or conspiracy against clinics in the Washington metropolitan area, clinics providing abortion services, to carry out the so-called rescues under the banner of "Operation Rescue," "Project Rescue," "D.C. Project" and "The Veterans Campaign for Life." The Court finds that the defendants have engaged in a conspiracy to do that and have committed overt acts in furtherance of it.

The Operation Rescue itself defines "rescue [B-92] missions" as "heroic attempts by God-fearing people to save babies and mothers from abortion on a particular day by peacefully, but physically, blockading abortion mills with their bodies to intervene between abortionists and innocent victims." That quote comes from an exhibit admitted in this case.

So the Court finds that the defendants engaged in a conspiracy. It also finds that it engaged in this conspiracy for the purpose of depriving, either directly or indirectly, a class of persons—namely, women seeking the services of these abortion clinics—of the privileges and immunities under the laws of the United States, namely, the right to travel.

The evidence was clear that a substantial proportion of women for the Virginia clinics come from out of state —20 to 25 percent, as I recall the testimony. And indeed, it's clear that that's true for clinics in other areas of the metropolitan area as well.

It is also clear from the record that the defendants have acted in furtherance of the conspiracy and that by doing so, they have actually effected blockades in the Washington metropolitan area and have deprived that

class of women of their rights and privileges to unhindered interstate travel.

Now, these unlawful rescues have obstructed and [B-93] closed down clinics in the Washington metropolitan area. They've accomplished this by having its membership—that is, the membership of Operation Rescue, various members—trespassing or sitting in or blocking or impeding and obstructing ingress to and egress from such facilities and have impeded the public passage on sidewalks and the streets and the driveways.

While the clinics are closed, patients are unable to receive any medical treatment or services. And although it is not—as I understand it, it is not the case in the Virginia clinics. But in the example provided to the Court of the Maryland clinic, the Court was able to see that some medical emergency could certainly arise. And the Court concludes from the evidence it's heard that it is possible for that to happen even with respect to the Virginia clinics where they do not perform, as I understand it, 23- or 24-week terminations.

Nonetheless, the closing of clinics, the Court finds, does harm not only the clinics but also causes injury to women by disrupting, delaying or denying their access to these facilities. Some may not obtain the medical services when they need them or the counseling or any of the other services.

There's an extensive history of rescues involving blockades and trespasses by Operation Rescue. There [B-94] appears to be litigation in a number of other jurisdictions, and, indeed, it appears to have been enjoined in New York, in Pennsylvania, in the District of Columbia, in Maryland, and I believe in Washington and California as well.

And there's also evidence that the defendants have violated the injunctions in the District of Columbia and Maryland. Now, that doesn't mean that the individuals who actually blockaded in Maryland and the District of Columbia are in contempt of court. They may not have had notice of the injunctions and they may not fit all of

the requirements for a contempt of court action. But it is clear that, notwithstanding the existence of ordinances prohibiting trespassing which exists on the books of District of Columbia, law books of District of Columbia and Maryland, that these individuals are determined, nonetheless, to sit in and blockade, prevent the ingress and egress to these clinics.

And a number of persons have been convicted of crimi-nay offenses for that. It appears that on October 29, 1988, the Falls Church Police Department arrested over 240 people in connection with so-called rescues that occurred at the Commonwealth Women's Clinic, one of the plaintiffs here. Among the persons arrested there was the Defendant Jayne Bray. And the clinic remained closed until after [B-95] 1:30 p.m.

In April '89, the Metropolitan Family Planning Institute was closed between seven in the morning and ten forty-five as a result of rescue efforts. And arrests didn't begin on that day until about 1 p.m.

This past weekend on November 18th at the Hillcrest Women's Surgi-Center in Bowie, Maryland, demonstrators from Operation Rescue closed or their sit-ins and blockades effectively closed that facility between 6 a.m. and 7 p.m.

There was evidence that a number of the patients at that facility were in the process of undergoing abortions that had been commenced the previous day by the insertion of laminaria and that some of these women have traveled from out of state for that purpose. Although this occurred in Maryand and although it appears that late-term terminations are not done at the Virginia facilities, the Court nonetheless concludes that that's evidence from which this Court can and does conclude that blockading of clinics can lead to serious harm to women seeking the services of those clinics.

The defendants, of course, do not publicly state which clinics in the Washington metropolitan area are going to be the subject of rescues. And that fact, combined with

the limitations of the police resources, necessarily means [B-96] that the police action is going to be responsive rather than preventative.

And defendants, of course, as is their right, decline to represent to the Court and to assure the Court that they will avoid any such rescues or blockades in the Northern Virginia area. Nor will the defendants represent to the Court that they will undertake to advise all of their membership to refrain from such threatened and unlawful activities.

As I indicated, the Court is persuaded—and the plaintiffs did satisfy their burden of proof—that unless the defendants' threatened and unlawful conduct is enjoined, and if it came about, that irreparable harm could be done both to the individual health of the women and certainly their right to travel and to the plaintiffs' clinics' right to conduct their business.

Now, the Court's found a conspiracy. The Court also finds that under 1985(3) it is necessary for the Court to conclude that the purpose was to deprive, either directly or indirectly, any person or class of persons of the equal protection of the laws or of the equal privileges and immunities under the law.

Under that requirement, the Court finds that gender-based animus—in this instance, women seeking abortions—is an appropriate class under 1985(3). The [B-97] Court notes that there is substantial lack of uniformity in the law in this connection. But I note that in addition to the Second Circuit, it is also true that the Seventh Circuit in *Volk against Coler* and the Sixth Circuit in *Conklin against Lovely* [phonetic] and the D.C. Circuit in *Hobson against Wilson* [phonetic] all suggest that the—as well as the Ninth Circuit case in *Life Insurance of North America against Reichardt* all suggest that 1985(3) is not simply limited to concerted action against Blacks.

It is, however—and the Court recognizes it—an unsettled question. And indeed, the Fourth Circuit has not settled it either. But at this point, the Court concludes

that the Second Circuit in *National Organization for Women* correctly concludes that a narrow interpretation of the statute 1985(3) as protecting only Blacks and other—is untenable in light of the history of the act.

The Second Circuit concludes that it's untenable to believe that Congress would provide a statutory remedy against private conspiracies, the purpose of which is to deny rights common to every citizen, and exclude women as a class from the shelter of its protection. And the court went on to say: We, therefore, hold that women may constitute a class for purposes of 1985(3).

The Court agrees with that conclusion. The class [B-98] here is the class of women seeking the services of the clinics.

The Court also concludes that the defendants' conspiracy operates to deprive the non-Virginia members of this class of their right to travel. The Court's not persuaded that it was entirely intrastate.

It isn't appropriate to view this solely on the basis of impeding their progress from the sidewalk in Virginia to the front door. It is legally relevant to inquire where the journey commenced, where they reside, and from whence they come to seek these services.

And the right to travel includes the right to unobstructed interstate travel to obtain the abortion and other medical services. And the testimony did establish that the clinics did provide medical services to women who travel from out of state. And it is clear beyond dispute from the record that defendants' activities blocked these women's access.

And the defendants' history of these rescue activities and rescue training sessions in which they counsel their adherence, Operation Rescue's adherence to engage in this blockading, nonviolent activity satisfies the statute's overt act requirement.

And the Court concludes that the right to travel is protected from both personal as well as state [B-99] interference and, therefore, plaintiffs need not prove state involvement to prevail on the claim of deprivation of the right to travel interstate. And accordingly, the Court concludes that the plaintiffs have established all of the elements of the 1985(3) claim for, under the interstate travel aspect of it and are entitled to relief. The subject of what kind of relief, I'll come to shortly.

Now, the plaintiffs also allege infringement of privacy rights, the right of abortion, under 42 United States Code, section 1985(3). This claim is premised on the right to obtain an abortion, a right which apparently stems from *Roe against Wade* and *Griswold*, stemming originally from the First Amendment.

Plaintiffs argue that the right of privacy should not be found solely from the First Amendment but rather should be found to be implicit in the Bill of Rights, apparently as a whole, or the Constitution somewhere as a whole, and should be a right of such dignity as not to require state action.

In any event, the Court doesn't reach this portion of 1985(3). Like the Second Circuit, it doesn't need to reach it. Having found, in effect, on a nonconstitutional basis, a noncontroversial one, that there is a cause of action, there is no need to consider the cause of action that raises what is especially now a hotly [B-100] disputed constitutional issue after *Webster*, namely, what precisely remains of *Roe against Wade* and, moreover, a clearer understanding of where the right to privacy comes from and, hence, where the right to an abortion comes from. The Court simply doesn't need to face that and doesn't.

Now, with respect to trespass, plaintiffs—the Court finds that the defendants' activities do constitute, or the activities of Rescue, if carried out in Northern Virginia, would constitute trespass in violation of Virginia Code sections 18.2-119 and -121. It would also constitute a violation of local trespass ordinances.

Those sections make it unlawful to enter or remain on the property of another after having been forbidden to do so, and to instigate or encourage others to enter or

remain upon the property of another knowing that such persons have been forbidden to do so, and to enter the property of another for the purpose of damaging such property or interfering with the rights of the owner, user or occupant of such property.

Plainly based on the record, the rescue, so-called rescue efforts, if carried out in Northern Virginia—they have been in the past, I should have noted; there is evidence that they have been carried out on a number of occasions in the past—would constitute a violation of those statutes. And, therefore, plaintiffs [B-101] are entitled to relief if that were—and I'll come to what relief.

The Court also concludes that the plaintiffs have established that defendants' rescue activities would constitute a public nuisance under the law of Virginia and that an injunction would be appropriate if there is no adequate remedy at law or the likelihood of irreparable injury.

In sum—and with respect to tortious interference with business relationships, the Court does not believe that that cause of action is either necessary or appropriate as a basis for injunctive relief in this case. It may be that if blockades were to occur, then specific actions might be brought under those circumstances. But that particular cause of action, once you show trespass and nuisance, it really is unnecessary to consider. It involves the element of whether they know about the existence of a contract—that is, whether the defendants know of the existence of a contract—and then interfere with it. And the Court concludes that it isn't necessary to reach that cause of action to give the plaintiffs the relief they seek.

Now, the propriety of injunctive relief. First, the Court concludes that the plaintiffs do have standing. I should have said that at the outset. The organizational [B-102] plaintiffs have standing to represent and to sue on behalf of their members, who include women who will need to use the abortion facilities in Northern Virginia and Washington metropolitan area. And the plaintiff clinics clearly have standing to assert their rights, both

on behalf of their patients and on behalf of their own interests.

And the Court concludes that injunctive relief is appropriate. But it must be tailored; it must be tailored to ensure that defendants' First Amendment rights are not impaired.

And the Court also concludes that the balance of equities weighs in favor of the plaintiffs in this case—because an injunction doesn't stop the defendants from doing anything that they're entitled to do under the law; it merely stops them, seeks to stop them from doing that which the law proscribes.

This is not a case of a clash of rights. This is not a case where parties come to court each asserting constitutional rights which clash and need to be balanced, not the case, for example, which may occur—and, of course, this Court doesn't express any view on it—as in the case that will come to the supreme court, perhaps, on the issue of parental notification, which may involve a balancing of rights. This is not such a case. This is not a case of clash of rights.

[B-103] This is simply a case where the defendants for their own reasons, deeply felt moral reasons, feel compelled to demonstrate in a way that violates the law. The law doesn't permit that, and, therefore, this Court will enjoin that activity permanently. However, I'll indicate some limitations on that in a moment.

In any event, the Court considers that an injunction is appropriate and that an injunction will issue, but one tailored so that nothing in it should be construed to limit the defendants' free exercise of their First Amendment rights.

As I said in the TRO, nothing in the order limits the defendants' First Amendment rights to express their view on abortions publicly and in a proper manner in the vicinity of any facility. But that right cannot be used as an excuse to violate the plaintiffs' rights both to travel interstate and free ingress and egress from the clinics

and to be free of nuisance and trespass in the blockade of their facilities.

I will also have the order terminate by its own terms on June 30, 1990. That means that if it is necessary for some reason for the plaintiffs to continue, or they believe that the activity continues to be threatened, they can return to court.

The reason that the Court limits it to June 30 is [B-104] that one can never tell what sorts of events, legal and otherwise, may overtake this order. But this Court will not hesitate to reenter the order if persuaded that the threat exists in the same way that it's persuaded it exists today. I simply don't want an injunction, a permanent injunction to be there indefinitely.

Did I say "June 30th"? I meant the end of July. I meant to have a full—it's July 31, isn't it? Isn't that the last day of July?

July 31: all right.

In addition, the Court will require the plaintiffs to call this order, when issued, to the attention of the police departments in Northern Virginia. The Court's going to limit the injunction to the Northern Virginia area that it previously limited it to.

And the reasons for those I intimated in the colloquy with you, Mr. Schafer. There are substantial practical considerations, not the least of which is the fact that other courts already have ongoing proceedings.

It would be presumptuous, I think, for this Court to enter an injunction covering the District of Columbia when it would appear that an injunction already exists there; and there may be violations and there may or may not be hearings on it. It would be unnecessarily intrusive of this Court to insert itself in that process. And the same [B-105] is true with respect to Maryland.

So the order will provide that the plaintiffs are to bring this to the attention of the police departments of the various localities, cities and counties, that are mentioned, and

they will include Arlington, Fairfax, Fairfax City, Loudoun, Prince William, City of Alexandria.

Have I omitted any there, Mr. Schafer?

MR. SCHAFER: I don't believe so, Your Honor.

Oh, Falls Church.

THE COURT: Falls Church; all right. And Falls Church.

Now, I think it is also important—and I haven't concluded this yet. I'm going to take this under advisement for a day because I have some additional investigation to pursue in this regard. But I think it would be useful for this order to reflect and to give fair notice to those what a violation of the order might result in in the way of a fine—not that it would be invariably that, certainly not for second or third offenses, but in the absence of extenuating circumstances.

* * * * *

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No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

PARTIES

The petitioners are as follows: Jayne Bray, Michael Bray, Clifford Gannett, Patrick Mahoney, Michael McMonagle, Randall Terry, and Operation Rescue.*

The petitioners were each defendants in the district court and appellants and cross-appellees in the court of appeals. The following were also named as defendants in the district court but were not parties in the court of appeals: Project Rescue, the D.C. Project, and Veterans Campaign for Life.

The respondents are as follows: Alexandria Women's Health Clinic, Commonwealth Women's Clinic, Gynecare Associates, Metro Medical Center, Inc., d/b/a Annandale Women's Center, Nova Women's Medical Center, Planned Parenthood of Metropolitan Washington, DC, Inc., Prince William Women's Clinic, National Organization for Women, Maryland National Organization for Women, Virginia National Organization for Women, and 51st State National Organization for Women.

The respondents were each plaintiffs in the district court and appellees and cross-appellants in the court of appeals. The following were also plaintiffs in the district court and cross-appellants in the court of appeals, but were not appellees in the court of appeals: Capitol Women's Center, Inc., Hillcrest Women's Surgi-Center, and Metropolitan Family Planning Institute. The following was also named as a plaintiff in the district court but was not a party in the court of appeals: National Abortion Federation.

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* Pursuant to Rule 29.1, petitioners state that none of the petitioners is a corporation.

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONERS

DECISIONS BELOW

The decision of the district court is reported as *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989). The decision of the court of appeals is reported as *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit in this case was entered on September 19, 1990. Petitioners filed their petition for a writ of certiorari on December 18, 1990. This Court granted the petition on February 25, 1991. *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). This Court has jurisdiction, under 28 U.S.C. § 1254(1), to review the judgment of the court of appeals.

STATUTORY PROVISIONS

42 U.S.C. § 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1988 provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title V of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The underlying action in this case is a suit for declaratory and injunctive relief under federal and state law. Respondents—plaintiffs in the district court—are abortion facilities and organizations advocating a legal right to abortion. Petitioners—defendants in the district court—are six individuals and an organization opposed to abortion.

Respondents alleged that petitioners have engaged in illegal activities, and threaten to continue to do so, in order to stop abortions. There are, however, no allegations that any of the petitioners have violated the injunction which the district court granted in the case at bar.

Respondents have asserted two federal causes of action: first, a conspiracy to violate a right to travel under 42 U.S.C. § 1985(3); and second, a conspiracy to violate a privacy right to abortion, also under § 1985(3). JA [1] 15-16 (Amended Complaint ¶¶ 38-41). Respondents also asserted three pendent state causes of action: trespass, public nuisance, and tortious interference with business relationships. JA 16-18 (Amended Complaint ¶¶ 42-51). Federal jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1342. JA 7 (Amended Complaint ¶ 3).

1. Statement of Facts

As the district court found, "[i]t is indisputable that all [of the petitioners] share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." 726 F. Supp. at 1488 (Pet. App. 20a). The district court found that "[t]o achieve these goals," each of the individual petitioners acted "through and in concert with Operation Rescue" to organize "rescue"

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[1] In this brief, the abbreviation "JA" refers to the Joint Appendix, and the abbreviation "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

events, *id.*, some of which included trespassing and obstruction of ingress and egress at abortion facilities, *id.* at 1489 (Pet. App. 21a).

The district court made the following findings of fact regarding the "purpose" of petitioners' "rescue" activities:

> The purpose of these "rescue" demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely. No one has put this point any better than defendant Terry, who in an affidavit, states that "while the child-killing facility is blockaded, no one is permitted to enter past the rescuers . . . Doctors, nurses, patients, staff, abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress." [JA 25.] Operation Rescue's literature defines "rescues" as *"physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims." *Operation Rescue, National Day of Rescue—October 29, 1988* (1988) (emphasis in original). [JA 22.] By disrupting and blockading family planning and abortion clinics, defendants and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views.

726 F. Supp. at 1488 (Pet. App. 20a). The district court did not find, and respondents neither argued nor attempted to prove, that petitioners had any motivation for trying to stop abortions other than sincere opposition to the killing of unborn children.

The term "rescue" can refer to a variety of activities directed toward stopping abortion (i.e., *rescuing* the unborn child from abortion). The term can include not only physical obstruction of access to abortion facilities, but also a variety of distinct, expressive activities protected

under the free speech guarantee of the first amendment, such as picketing, distributing literature, and verbally seeking to persuade pregnant women entering abortion facilities to carry their children to term.[2] Under this broad definition of "rescues," respondent Commonwealth Women's Clinic, in Falls Church, Virginia, has, as the district court found, been "on almost a weekly basis . . . the target of 'rescue' demonstrations . . . ." 726 F. Supp. at 1489 (Pet. App. 22a).[3]

The term "rescue" also can refer more particularly to efforts physically to block access to an abortion business. *Id.* at 1488 (Pet. App. 20a) (citing definition of "rescue" in Operation Rescue literature). In the narrow sense of an actual physical blockade, the district court found that one rescue had occurred, a year prior to the court's order granting an injunction against petitioners, at the Commonwealth Women's Clinic in Virginia. *Id.* at 1489 (Pet. App. 22a) (October 29, 1988). The court also found that rescues have occurred at a number of other locations outside of Virginia, *id.* at 1490 (Pet. App. 23a), including the Washington Metropolitan area, *id.* (April 1989 rescue in the District of Columbia); *id.* (additional rescues in the District of Columbia and Maryland).

The district court found there to be a "substantial likelihood" of blockades at abortion facilities in the

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[2] Respondents' witness Nancy Dickinson-Collins, for example, used the term "rescue" to encompass a wide range of anti-abortion activities, Trans. of Nov. 16, 1989 hearing (morning session) at 35-38, 40-41, including not only physical blockades but also such free speech activities as chanting from the sidewalk that abortion is murder. *id.* at 36; offering help to women entering abortion facilities, *id.*; urging pregnant women to choose adoption, *id.*; and offering literature, *id.* at 37.

[3] There is no evidence to support any claim (and respondents have made no such claim) that the Commonwealth Clinic has been subject to weekly blockades. On the contrary, blockades are clearly special events.

Northern Virginia area "in the immediate future." *Id.* (Pet. App. 25a). There was no direct evidence, however, of "current plans for 'rescue' demonstrations at clinics in the Northern Virginia area," *id.* (Pet. App. 24a), and the court's conclusion about the threat of future blockades rested entirely on an inference from the "established history" of blockades "in the Washington Metropolitan area and elsewhere," *id.* (Pet. App. 25a), together with the refusal of petitioners specifically "to report to the Court that 'rescue' demonstrations designed to close clinics would not be carried out against Northern Virginia clinics in the future," *id.*

The district court found that physical obstruction of abortion facilities hinders or prevents abortions from taking place at such facilities. *Id.* at 1489-90 (Pet. App. 21a-23a). The court also found that "[s]ubstantial numbers of women" seeking abortion in the Washington Metropolitan Area "travel interstate to reach the clinics." *Id.* at 1489 (Pet. App. 22a). In particular, the court found that "approximately twenty (20) to thirty (30) percent" of the patrons of the Commonwealth Women's Clinic in Virginia "come from out of state." *Id.*

The district court did not find, and respondents neither argued nor attempted to prove, that the place of residence of women coming to abortion facilities made any difference to petitioners' efforts to stop abortion; that petitioners discriminated in any way between women traveling interstate and women traveling intrastate; or that petitioners interfered with any "travel" other than access to a particular abortion facility.

Finally, respondents' counsel conceded before trial that "we are not alleging and don't plan to prove State action, and we stand or fall on that." Trans. of Nov. 16, 1989 hearing (morning session) at 13.

2. Course of Proceedings

At the close of trial, the district court granted a permanent injunction.[4] The district court ruled in favor of respondents on their first federal claim (conspiracy to violate a right to travel), and on two of their pendent state claims (trespass and public nuisance). The court declined to address respondents' remaining federal claim (conspiracy to violate a right to abortion) and state claim (tortious interference with business relationships). *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493-96 (E.D. Va. 1989) (Pet. App. 31a-36a).

The district court acknowledged the requirement, under 42 U.S.C. § 1985(3), that the offending parties act with a "class-based discriminatory animus." 726 F. Supp. at 1492 (Pet. App. 28a). The district court held that "gender-based animus" satisfies this requirement. *Id.* The court further held that statute applicable on the facts of this case because "women seeking abortions" are a "subset of a gender-based class," *id.* at 1492-93 (Pet. App. 29a). The court recognized a conflict among the federal courts on this issue, *id.*, but found the "majority" view persuasive, *id.*

With respect to the requirement of an independently existing right secured under § 1985(3), the district court relied upon a federal constitutional right to interstate travel. *Id.* at 1493 (Pet. App. 30a). The court held that because abortion businesses in Northern Virginia have clients "who travel from out of state," *id.*, blocking access to these businesses "interfere[s] with these person's [sic] right to unimpeded interstate travel,"

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[4] The district court provided that the "permanent" injunction would expire on July 31, 1990, unless the plaintiffs were to show good cause for its extension. 726 F. Supp. at 1498 (Pet. App. 41a). The district court subsequently extended the injunction, which is currently set to expire on September 24, 1991. *See National Organization for Women v. Operation Rescue*, No. 89-1558-A, slip op. at 2, 5 (E.D. Va. Sept. 21, 1990) (Pet. App. 58a, 60a).

id. The court rejected petitioners' argument that such blockades "affect only intra-state travel, from the street to the doors of the clinics." *Id.*

The court also held that this "right to interstate travel is protected from purely private as well as governmental interference," and therefore no showing of state action was necessary. *Id.*

The district court declined to reach respondents' claim that petitioners were violating a constitutional right to abortion that is enforceable against purely private action. *Id.* at 1493-94 (Pet. App. 32a-33a). Observing that such a claim is "problematic" and "novel," the court held that it would be "unnecessary and imprudent to venture into this thicket." *Id.* at 1494 (Pet. App. 32a-33a).

Petitioners appealed to the United States of Appeals for the Fourth Circuit. Respondents cross-appealed, challenging certain limitations on the scope and duration of the injunction.

The district court subsequently awarded costs and attorneys fees to respondents. *National Organization for Women v. Operation Rescue*, No. 89-1558-A (E.D. Va. Feb. 13, 1990) (Pet. App. 43a). Petitioners appealed from this order as well, and the court of appeals consolidated this appeal with the previous appeal and cross-appeal.

The court of appeals affirmed the judgment of the district court in all respects (including denial of respondents' cross-appeal). *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam) (Pet. App. 1a).

The court of appeals decided the case solely on the basis of the federal legal issues. *Id.* at 585-86 (Pet. App. 8a-9a). The court engaged in no independent analysis of the district court's rulings under § 1985(3). Rather, the court simply noted that the "legal premises under which the district court operated are . . . consistent with the

law of the circuits." *Id.* at 585 (Pet. App. 8a). Announcing that it was reviewing the injunction under "an abuse of discretion standard," *id.*, the court of appeals held that the district court "operated in conformity with other circuits on the relevant questions of law," *id.* The court rested its disposition of the appeal specifically upon "the federal question raised by appellants [petitioners]," and therefore declined to address the propriety of pendent jurisdiction over respondents' state claims. *Id.* at 586 (Pet. App. 9a). Finally, the court upheld the award of attorneys fees. *Id.*

SUMMARY OF ARGUMENT

In the case at bar, respondents have attempted to convert a state-law action for injunctive relief against trespass into a federal civil rights conspiracy claim under 42 U.S.C. § 1985(3). Respondents' § 1985(3) claim, however, fails on its merits—indeed, the claim is not even sufficiently substantial to confer federal subject matter jurisdiction. With the failure of this federal cause of action, respondents' claim to an award of attorneys' fees must also fall.

Respondents are abortion facilities and organizational proponents of legalized abortion. Petitioners—six individuals (one woman and five men) and an organization—consider abortion to be the wrongful destruction of innocent unborn human offspring. Petitioners allegedly threaten to engage in "rescue" activities, i.e., "sit-ins" or physical blockades designed to stop abortions by preventing access to abortion facilities.

Respondents invoked § 1985(3) against petitioners on the basis of these threatened "rescues." Respondents' claim to relief under § 1985(3) must fail, however, for two fundamental reasons: first, absence of the necessary statutory element of "invidiously discriminatory class-based animus"; and second, absence of a protected right secured under § 1985(3).

1. Under this Court's decisions in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), and *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983), a party bringing suit under § 1985(3) must establish a "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102 (footnote omitted); *Scott*, 463 U.S. at 834-35. In the present case, respondents rest their claim upon a charge of invidious animus against "women seeking abortions."

Respondents' accusation of animus against "women seeking abortions" must fail. This "animus" claim depends entirely upon two faulty legal propositions: first, that "women seeking abortions" is a proper class for purposes of "class-based animus" under § 1985(3); and second, that opposition to abortion is, *per se*, the legal equivalent to anti-female animus. Neither proposition withstands considered analysis.

"Women seeking abortions" cannot be a proper class under § 1985(3) because it is not really a class at all; rather, it is an *activity* dressed up to look like a class. Anti-abortion "rescues" target the *practice* of abortion itself; hence, "rescuers" bar access to *all* those involved in the practice of abortion—physicians, staff, abortion-bound women and their companions. The true "class," if any, obstructed by a "rescue" is "persons participating in the practice of abortion." Respondents' artificial selection of a sub-class of "women seeking abortions" is arbitrary, under-inclusive, and misleading. In essence, respondents' designation of the class as "women seeking abortions" represents an attempt, by semantic sleight-of-hand, to mischaracterize petitioners' undisputed actual motive—sincere opposition to the *practice* of abortion—as discrimination against a *class*.

There is no evidence that petitioners—one of whom is a woman—were motivated by any anti-female animus; on the contrary, the district court explicitly found that

petitioners were motivated by a deep commitment to defending the lives of the "innocent victims" of abortion—i.e., unborn children. Thus, the decision of the court of appeals necessarily rests upon the proposition that opposition to abortion, in and of itself, translates *as a matter of law* into animus against women.

Opposition to abortion, however, cannot be deemed the *per se* legal equivalent of invidious sex discrimination. Women (and men) are deeply and sincerely divided over the issue of abortion, and the stance of respondents on this controversy cannot be categorically pronounced "pro-woman" while the contrary views of petitioners and other opponents of abortion are categorically condemned as "anti-woman."

2. Under this Court's decisions in *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1972), and *United Brotherhood of Carpenters v. Scott*, a claimant under § 1985(3) must satisfy an additional statutory requirement: the claimant must identify some independently existing right or rights which the alleged conspiracy threatens to deny. *Novotny*, 442 U.S. at 372; *Scott*, 463 U.S. at 833.

Respondents assert that "rescue" activities threaten to deny two federal constitutional rights: a right to interstate travel and a right to abortion. Neither right, however, is implicated in the present case.

An anti-abortion "rescue" or sit-in does no more than hinder *intrastate* travel—i.e., from the sidewalk to the interior of an abortion facility. The federal constitutional right to interstate travel, however, does not encompass a general federal tort of obstruction. Where, as here, there is no discrimination on the basis of the residence of would-be abortion patrons, and no blockade of border passage, the right to interstate travel is simply not implicated by the purely incidental fact that some patrons come from across state lines.

Respondents' assertion of a right to abortion is also unavailing. Respondents have conceded the absence of state action in the present case; hence, there can be no infringement, under the Fourteenth Amendment, of any abortion right previously articulated by this Court. Necessarily, then, respondents' abortion claim must rest upon an invitation to the federal judiciary to create a new constitutional right to abortion that is effective against purely private action. This Court should decline respondents' call for such a dramatic expansion of current abortion jurisprudence.

Under *Hagans v. Lavine*, 415 U.S. 528 (1974), and numerous other precedents of this Court, a federal claim that is patently insubstantial cannot serve as a basis for federal subject matter jurisdiction. Respondents' manifestly deficient federal claim under § 1985(3) fails the *Hagans* test; hence, the courts below lacked federal subject matter jurisdiction over respondents' suit.

Finally, given the failure of respondents' only federal cause of action, the award of attorneys' fees to respondents under 42 U.S.C. § 1988 must fall.

ARGUMENT

The present case does not belong in federal court. As the district court acknowledged, the respondents' suit "was, essentially, a simple trespass action," *National Organization for Women v. Operation Rescue*, No. 89-1558-A, slip op. at 5 (E.D. Va. Feb. 13, 1990) (Pet. App. 46a); moreover, the federal claims respondents have asserted simply cannot survive reasoned analysis.

The court of appeals erred in sustaining respondents' federal action under 42 U.S.C. § 1985(3). Indeed, respondents' federal claims are so patently insubstantial as to be insufficient to confer federal subject matter jurisdiction. Furthermore, the award of costs and attorneys fees to respondents must fall with the rejection of respondents' federal claims. Thus, this Court should reverse the judgment of the court of appeals.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENTS ARE ENTITLED TO RELIEF UNDER 42 U.S.C. § 1985(3).

The court of appeals erred by sustaining the use of 42 U.S.C. § 1985(3) against petitioners. Respondents failed, as a matter of law, to establish that petitioners acted with an invidiously discriminatory animus against any class protected under § 1985(3). Furthermore, respondents have failed, as a matter of law, to establish that petitioners violated any protected right that would trigger § 1985(3).

This Court has clearly identified several basic elements of a claim under § 1985(3). *See United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckinridge*, 403 U.S. 88 (1971).[5] Two crucial requirements for a § 1985(3) claim are dispositive in the present case. First, a plaintiff must allege and prove a "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102 (footnote omitted); *Carpenters v. Scott*, 463 U.S. at 834-35. Second, a plaintiff must identify some independently existing right or rights which the defendants allegedly have violated or threaten to violate. *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979); *Scott*, 463 U.S. at 833. In the

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[5] The Court has held that

> to make out a violation of § 1985(3), the plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Brotherhood of Carpenters v. Scott, 463 U.S. at 828-29.

present case, respondents' claim fails to satisfy either of these statutory requirements.

A. Respondents Have Not Established the Requisite Class-Based Animus Under § 1985(3).

The court below erred in holding that respondents' claim satisfies the statutory requirement, under § 1985 (3), of class-based invidiously discriminatory animus.

The need to establish an invidious, class-based animus behind the actions of the alleged conspirators marks an important boundary for the reach of § 1985(3). As this Court recognized in *Griffin*, the "enormous sweep of the original language" of the bill that produced § 1985(3) "led to pressures for amendment" in the form of limiting language. 403 U.S. at 100. Explanations of the resulting amendment "centered entirely on the animus or motivation that would be required," *id.*; this "animus" requirement served as a crucial means of preventing § 1985(3) from becoming a general federal prohibition of private conspiracies, *id.* at 102.

Thus, in enacting § 1985(3), Congress "did not provide a federal remedy for 'all tortious, conspiratorial interferences with the rights of others.'" *Carpenters v. Scott*, 463 U.S. at 834 (quoting *Griffin*, 403 U.S. at 101). On the contrary, Congress passed this law with the very specific purpose of targeting *invidious discrimination*. As this Court explained in *Griffin*, the text of § 1985(3) must be construed with this "target" in mind:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of *invidiously discriminatory motivation* stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise *class-based, invidiously discriminatory animus* behind the conspirators' action.

Griffin, 403 U.S. at 102 (emphasis added in part; footnote and citation omitted) (quoted in *Scott*, 463 U.S. at 834-35).

The decision of the court of appeals, holding the necessary class-based animus to be present in the case at bar, rests upon two faulty legal premises: first, that "women seeking abortions" is a proper class under § 1985 (3); and second, that anti-abortion activities *per se* manifest a discriminatory animus against women. Neither premise survives reasoned analysis.

1. *"Women seeking abortions" is not a valid class under § 1985(3).*

"Women seeking abortions" is not a class cognizable under § 1985(3); rather, this supposed group really represents an improper attempt by respondents to dress up opposition to an *activity*—the practice of human abortion—to look like opposition to a *class*.

This Court has repeatedly counseled restra[illegible] the face of calls for expansive enumeration of [illegible]ential classes under § 1985(3). Thus, in *Scott*, the Court observed that "it is a close question whether § 1985(3) was intended to reach *any* class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *Scott*, 463 U.S. at 836 (emphasis added). This Court has repeatedly "withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Id.* at 837.[6]

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[6] In a similar vein, the Seventh Circuit explained the wisdom of a cautious approach to novel § 1985(3) claims:

The purported class of "women seeking abortions" in the case at bar provides no occasion for departure from this explicit and deliberate practice of interpretive restraint. This supposed class is not really a class at all, but is instead an *activity*—abortion—presented in the guise of a class.[7]

That respondents have artificially designed this class appears immediately from the uncontested fact that the true "class," if any, targeted by anti-abortion "rescues" is "people participating in the practice of human abortion."[8] As the undisputed factual record shows, "while

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The question of the classes protected under the provision is one of statutory construction. As construed in *Griffin* and *Scott*, § 1985(3) was enacted to fulfill a highly specific purpose and to meet an unusual condition in the Reconstruction era. Since its decision in *Griffin*, the Court has not expressly provided a remedy to a group or class other than blacks. The import of both *Griffin* and *Scott* is that the legislative history of § 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class-based animus against "Negroes and their supporters."

Grimes v. Smith, 776 F.2d 1359, 1366 (7th Cir. 1985).

[7] The class of "woman seeking abortions" suffers from the same flaw as the class proposed and rejected in the *Scott* case. As the dissenting judges in the court of appeals in *Scott* contended,

> This class is one newly defined by this case, not one having any previous discernible jurisprudential identity. It is not a "class" marked by historical oppression, by minority status, by any social or political animus directed against it, by any political or religious belief, or by any of the indicia usually used to identify a class of persons who must be accorded special protection. The animus here was not directed at the membership of the plaintiffs in such a class or at their association together either as persons or in some . . . group campaign, but at their *activities* . . . .

Scott v. Moore, 680 F.2d 979, 1018 (5th Cir. 1982) (dissenting opinion) (emphasis in original), *rev'd*, 463 U.S. 825 (1983).

[8] This "class," of course, is simply a more accurate—if nonetheless misleading—attempt to translate the opposition of petitioners

the child-killing facility is blockaded, *no one* is permitted to enter past the rescuers. *Neither women nor men.* Doctors, nurses, patients, staff, abortion-bound women—*all* are prevented from entering the abortuary while the rescue is in progress." JA 25 (Plaintiffs' Trial Exhibit 12: Affidavit of Randall A. Terry) (emphasis changed). *See* 726 F. Supp. at 1488 (Pet. App. 20a) (quoting from the Terry affidavit and finding that "[n]o one has put this point any better than [petitioner] Terry"). In the present case, then, as in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), respondents have "designated a class that is so under-inclusive as to mischaracterize the dispute." *Id.* at 794 (lead opinion of Gee, J.) (rejecting the class of "women of child-bearing age who seek medical attention from the [plaintiff abortion facility]").

Respondents' selection of a sub-class designated "women seeking abortions" is entirely arbitrary. Respondents might just as well have designated a sub-class of "physicians seeking to induce abortions" or, for that matter, a racial sub-class of "black women seeking abortions" or "white women seeking abortions."[9] All such artificial class designations, however, represent improper efforts to conjure "classes" into being purely by means of definitional manipulation.

The supposed class in this case does share a common feature—the members are each "seeking abortions"—but this feature represents an *activity* and not the sort

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to an *activity* (abortion) into an animus against a *class*. As a class, "people participating in abortion" fails to satisfy the class requirement of § 1985(3) because it merely identifies those people affected by the alleged conspiracy. Any tortious conduct will necessarily have an impact on some "class" of individuals. But the class animus requirement would become meaningless if the class were to be defined simply as those persons injured by the conspiracy.

[9] Were a group of individuals actually to blockade an abortion facility and permit *only* black women to enter and abort their offspring, there would, of course, be genuine discrimination on the basis of *race*. Such is not the case here.

of *characteristic* (immutable or otherwise) necessary to define a proper class. To hold otherwise would be to open the doors to claims limited only by the semantic creativity of attorneys, *e.g.*, "investors seeking interest" as the "class" targeted by those committing securities fraud; "adults seeking alcoholic beverages" as the "class" targeted by temperance activists; "non-vegetarians seeking to eat meat" as the "class" targeted by "animal rights" proponents; and so forth. Allowing such claims would effectively eliminate the requirement of "class-based" animus and convert § 1985(3) into a general federal tortious conspiracy statute.

That some might characterize the activity at issue here—seeking abortion—as a "right" makes no difference. As the United States Court of Appeals for the Ninth Circuit explained in *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1974), the complainants

> have not [alleged] and cannot allege, as they must if they would succeed, anything to distinguish them as intended victims other than that they belong to the class possessing the rights deprived—a circumstance true of all potential [targets of the alleged illegal conspiracy]. Under *Griffin* we think *the class status providing the motivating animus must be created by a fact other than possession of the right deprived—otherwise virtually every conspiratorial deprivation of a primary right would be actionable under § 1985(3) regardless of the pertinent statutory enforcement provisions.*

Id. at 928 (emphasis added).

Nor can respondents salvage their claim by arguing that because "women seeking abortions" is a subset of the broader class of "women," that this subset should partake of any protection afforded under § 1985(3) against gender-based animus.[10] As one district court perceptively observed,

[10] The question whether § 1985(3) applies not only to racial animus but also to gender-based animus raises a host of thorny issues. This Court has explicitly reserved the question whether classifications based upon gender are, like racial classifications, "inherently suspect." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982). Indeed, this Court has recognized that gender can serve as a defensible basis for discrimination even in the context of *government* action, and even in situations in which racial discrimination would be patently unconstitutional. *E.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (registration for military draft); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (statutory rape laws). Construing § 1985(3) to forbid even *private* discrimination on the basis of sex, with the same force as the current ban on racial discrimination, would be to open a statutory Pandora's Box. *Cf.* Brief Amicus Curiae of American Victims of Abortion §§ II, III(A)-(C) (concluding that "women seeking abortion" is not a suspect class under either congressional enactments or the Equal Protection Clause of the fourteenth amendment).

> if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender.

National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990).

Thus, respondents' designation of the class as "women seeking abortions" appears ultimately as a disingenuous and improper attempt to mischaracterize petitioners' sincere opposition to an activity—the practice of human abortion—as opposition to a class of people. Such verbal legerdemain cannot suffice to convert anti-abortion activism into "sex discrimination."

2. *Opposition to abortion is not the legal equivalent of discrimination against women.*

Any attempt to interpret the animus in question as gender-based animus must also fail. Petitioners' conscientious opposition to abortion, standing alone, simply does not translate into sex discrimination.

For a § 1985(3) claim to succeed, there must be some "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. at 102. Thus, "[i]n order to prove [their] claim under § 1985(3), [respondents] must show that the *protestors were motivated* by a (1) class-based (2) invidiously discriminatory animus." *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 793 (5th Cir. 1989) (lead opinion) (emphasis in original) (citing *Griffin*, 403 U.S. at 102). Respondents have shown no such motivation.

The true motivation of petitioner Jayne Bray and her fellow petitioners is obvious: the desire to discourage or prevent abortions. *See* JA 25 (Plaintiffs' Trial Exhibit 12: Affidavit of Randall A. Terry). *See generally* 726 F. Supp. at 1487-88 (Pet. App. 18a-20a) (findings of district court). Respondents have neither argued nor attempted to prove that any of the petitioners harbored the least bit of hostility toward women. Indeed, petitioner Jayne Bray *is* a woman. Furthermore, it is common knowledge that countless women are involved in anti-abortion activities of different kinds, including "rescue" efforts to block access to abortion facilities. *See* JA 22 (Plaintiffs' Trial Exhibit 7) (speech by woman rescuer) ("I have been in the forefront of a movement [Operation Rescue] which had led 20,000 women like me to risk imprisonment in this country").

The undisputed findings of the district court clearly establish the fact that Jayne Bray and her co-petitioners were motivated by genuine, conscientious opposition to the killing of unborn children in abortion. Thus, the district court found that:

> — " 'rescuers' view their blockading efforts as '*rescues' of fetuses* scheduled for abortion," 726 F. Supp. at 1487 (Pet. App. 18a) (emphasis added);
>
> — "[t]he individual defendants [petitioners] are persons who are opposed to abortion and its legalization and who are deeply committed to taking active

> steps to advance their views . . .," *id.* at 1488 (Pet. App. 19a);
>
> — "[i]t is indisputable that all defendants [petitioners] share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization. To achieve these goals, . . . [petitioners] organize, coordinate and participate in 'rescue' demonstrations . . .," *id.* (Pet. App. 20a);
>
> — "[t]he purpose of these 'rescue' demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely. *No one has put this point any better than defendant [petitioner] Terry*, who . . . states "*while the child-killing facility is blockaded, no one is permitted to enter* past the rescuers . . . Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress,' " *id.* (emphasis added; ellipsis in district court opinion) (*see also* JA 24-27: full text of Terry affidavit);
>
> — "[petitioner] Operation Rescue's literature defines 'rescues' as '*physically* blockading abortion mills with [human] bodies, to *intervene between abortionists and the innocent victims.' Operation Rescue, National Day of Rescue—October 29, 1988* (1988)," *id.* (first emphasis in original literature; second emphasis added) (quoting JA 22);
>
> — "[b]y disrupting and blockading . . . abortion clinics, defendants [petitioners] hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views," *id.*

Respondents' own evidence only further supports the obvious fact that the "animus" of petitioners is opposition to *abortion*, not opposition to *women*. Thus, in Plaintiffs' Trial Exhibit 1, Operation Rescue literature de-

scribes rescues as "heroic attempts by God-fearing people *to save babies and mothers from abortion*" (JA 22) (emphasis added). Plaintiffs' Trial Exhibit 7 contains a speech from a woman rescue leader decrying the accusations of "my sisters in the National Organization for Women" and explaining that "[w]e try to protect the 800,000 women whom the N.O.W. wants to see butchered in their own mothers' wombs." (JA 22). Plaintiffs' Trial Exhibit 12 is an affidavit in which petitioner Randall Terry explains his desire "to rescue those who are being dragged to their death" at a "child-killing facility" (JA 25). Terry rebuts at length the accusation of invidious sex discrimination by documenting that his religious beliefs forbid him to condemn others, including "abortion-bound women;" that he has a loving relationship with his wife and daughters; that he works along with women to help other women who face crisis pregnancies; and that "rescues" aim at stopping the *business of abortion itself* by preventing entry of *anyone* into the abortion facility. (JA 24-27.)

In short, the explicit factual findings of the district court and the uniform factual record in this case clearly confirm, as a matter of *fact*, that the "animus" of petitioners is sincere opposition to human abortion.

The decision of the court of appeals in the present case, therefore, must rest on the premise that opposition to abortion is, as a matter of *law*, the *per se* equivalent of opposition to women.[11] While this may be the sincere

[11] In *New York State National Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), a panel of the Second Circuit stated, without authority, that activities designed to stop abortions "reveal an attitude or animus based on gender." *id.* at 1359. This is equivalent to maintaining that efforts to stop child abuse "reveal an attitude or animus based on parental status." Such a strained, highly attenuated argument falls far short of meeting the discriminatory *motivation* requirement of § 1985(3).

belief of some proponents of legalized abortion, it is by no means a self-evident legal proposition. On the contrary, respondents' charge of sex discrimination represents an affront to the sincerity of countless women and men—including judges, legislators, scholars, and a multitude of others—who regard human abortion as the killing of innocent persons.

The petitioners in this case tried to stop women from having abortions, not because these women are *women*, but because petitioners believe that *abortion* is an atrocity. As in *Mississippi Women's Medical Clinic*, the

> protestors (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc. In fact, [the record] indicates that the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions. It is useful to reiterate that the legislative history indicates that Congress wanted to evaluate "class-based invidious discrimination" through the lens of "animus or motivation," not impact.

866 F.2d at 794 (lead opinion of Gee, J.) (emphasis in original) (citing *Scott*, 463 U.S. at 834-35). Thus, petitioners did not act with "a class-based animus, that is a prejudice against a group of persons or against a particular person *because of his membership in that group.*" *Roe v. Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir.) (emphasis added), *cert denied*, 484 U.S. 848 (1987).

Respondents' claim would require this Court to make a logical leap that is both unsupported and untrue: namely, that opposition to abortion is, as a matter of law, the *per se* equivalent of discrimination against women. This Court has never suggested that it is the business of a federal court to embrace, *as a matter of law*, the political stance and rhetoric of an advocacy group like respondent National Organization for Women. This

Court should decline respondents' invitation to label the entire pro-life movement, as a matter of law, as "sexist." *See generally* Brief for the Southern Center for Law & Ethics as Amicus Curiae (courts below erred by holding opposition to abortion to be the *per se* legal equivalent of sex discrimination).[12]

B. Respondents Have Not Established the Requisite Violation of a Right Protected Under § 1985(3).

Respondents have also failed to establish that petitioners violated, or threatened to violate, some independently existing right secured under 42 U.S.C. § 1985(3). As this Court has explicitly held, "[s]ection 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). "The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere . . . ." *Carpenters v. Scott*, 463 U.S. at 833.

Respondents alleged the violation of two rights for purposes of triggering § 1985(3): a "right to interstate travel," and a "right to abortion." No such rights

[12] The necessary "discriminatory" animus is also absent in the present case for the simple reason that anti-abortion "rescues" do not discriminate—i.e., rescuers do not seek to prevent only *some* women from aborting while permitting *others* to go ahead and abort:

> The mere deprivation of a right, however fundamental, is not a deprivation of *equal* protection. For a denial of equality to be the conspiratorial objective, the conspirators must seek to permit some persons to enjoy the protected right and to deny it to others. The reprobated objectives alleged in *Griffin* included, for example, the denial of the right of black persons to " 'travel the public highways without restraint in the same terms as white citizens in Kemper County, Mississippi.' " 403 U.S. at 92 (quoting the complaint). The proof in this case shows no comparable objective; the defendants did not seek to deny the right [in question] to the individual plaintiffs *while according that right to others.*

Scott v. Moore, 680 F.2d 979, 1014-15 (5th Cir. 1982) (dissenting opinion) (emphasis in original), *rev'd*, 463 U.S. 825 (1983).

are implicated in the case at bar. The constitutional right to interstate travel does not prohibit the physical obstruction of a facility simply because some patrons of that facility come from outside of the state. Nor is there a right to abortion in the absence of state action.

1. *Respondents have not established a violation of any right to interstate travel.*

The decision of the court of appeals in the present case rests upon the premise that private parties violate a federal constitutional right to travel whenever they block access to an establishment that serves at least some people who come from out of state. *See* 914 F.2d at 585 (Pet. App. 18a); *see also* 726 F. Supp. at 1493 (Pet. App. 30a). This premise represents a radical departure from the prior teachings of this Court. *See generally* Brief Amici Curiae of Daniel Berrigan, S.J. et al. [hereinafter, Berrigan Amicus Brief] (containing thorough analysis of Supreme Court decisions on the right to travel).

The implications of the holding of the court of appeals are astounding. Virtually every business located in a city situated near a state border (e.g., New York, Philadelphia, Washington, D.C., Chicago, Portland, St. Louis, Minneapolis, and so forth), as well as every business located on a major interstate route or in the vicinity of a tourist site or commercial center, will serve numerous out-of-state customers on a regular basis. According to the holding of the court below, any sit-in or mass picketing at such a business would be a federal constitutional violation.

Indeed, in the highly mobile modern American society, only the most remotely situated or parochially specialized business will not serve at least some out-of-state clients. Thus, the holding of the court below is tantamount to recognizing a general federal constitutional tort of obstruction valid for virtually every business establishment in the country.

This Court has never recognized a constitutional right to travel of such all-encompassing scope.

True, this Court has held that there is a "constitutional right to travel from one State to another," *United States v. Guest*, 383 U.S. 745, 757 (1966); the Court has further held that, at least in the context of racial discrimination, this right applies against private as well as government interference, *Griffin v. Breckinridge*, 403 U.S. 88, 105 (1971); *Guest*, 383 U.S. at 759 n.17.[13]

The right to travel, however, is not an unlimited right to mere physical movement. Rather, it is a "right of free *interstate migration*," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality opinion) (emphasis added), or, as Justice O'Connor would characterize it, a right to freedom from impermissibly burdensome discrimination between state residents, *id.* at 920 (O'Connor, J., dissenting). *See* Berrigan Amicus Brief § I (right to interstate travel is right to freedom from discrimination against nonresidents). There is no general federal constitutional tort of obstruction of public or private passage.[14]

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[13] This Court has never sustained the assertion of a constitutional right to travel, *in the absence of state action*, outside of the context of racial discrimination. *Guest* and *Griffin* may therefore be explained as predicated upon a right to travel flowing from the prohibitions of the Thirteenth Amendment, which applies against private action, *see Griffin*, 403 U.S. at 105. Any assertion of a general right to travel effective against purely private action would encounter serious constitutional difficulties. *See Guest*, 383 U.S. at 763-74 (Harlan, J., dissenting).

[14] As one court accurately observed,

> Supreme Court decisions finding a violation of the fundamental right to interstate travel . . . involved a provision requiring that the citizen be a resident for a certain length of time or at a certain time before the individual could receive a privilege or exercise a right. The cases that have recognized a fundamental right of interstate travel have done so vis-a-vis durational residency requirements. *See Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year residency requirement to vote) (impinged upon both fundamental right to vote and to interstate travel). *Id.* at 335; *Memorial Hospital v. Maricopa*, 415 U.S. 250 (1974) (one-year residency requirement to receive non-emergency hospitalization or medical care at the county's expense); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (required an individual to reside within the state for one year before he/she could file an application for AFDC); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (giving a preference in civil service employment opportunities to resident veterans who lived in New York at the time they entered military service).

Eldridge v. Bouchard, 645 F. Supp. 749, 753 (W.D. Va. 1986). In the present case, as in *Eldridge*, "the challenged action does not impinge the fundamental right to interstate travel because the . . . primary objective" of the challenged conduct—here, anti-abortion blockade "is . . . not to impede travel," but to achieve some other goal—here, to stop abortions—and there is no *discrimination* that would "penalize the exercise of the right to travel." *Id.*

[15] The residency restriction at issue in *Doe v. Bolton*, 410 U.S. 179 (1973), forbade abortions for nonresidents of Georgia *while allowing abortions for residents*. *Id.* at 202. This restriction there-

The right to interstate travel guarantees *equal* freedom to travel as between interstate and intrastate travelers. If the obstacle in question applies to *both* interstate and intrastate travelers, then the right to interstate travel is not implicated:

> Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive.

Dunn v. Blumstein, 405 U.S. 330, 342 n.12 (1972) (citation omitted; emphasis in original). Thus, in *Dunn* this Court struck down a one-year residency requirement for voting which "penalized those persons, *and only those persons*, who have gone from one jurisdiction to another during the qualifying time period." *Id.* at 338 (emphasis added).[15] But in *Village of Belle Terre v. Boraas*, 416

U.S. 1 (1974), by contrast, this Court sustained a single-family zoning restriction which was "not *aimed* at transients." *Id.* at 7 (emphasis added).[16]

The Constitution does not *give special privileges* to interstate travelers. *See Califano v. Torres*, 435 U.S. 1, 4-5 (1978) (per curiam) (rejecting argument that right to travel requires person who travels into a state to be given benefits superior to those who already reside there: "the broader implications of such a doctrine in other areas of substantive law would bid fair to destroy the independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents"). *See also* Berrigan Amicus Brief § II (right to interstate travel does not confer rights on nonresidents that exceed the rights of residents). On the contrary, the right to interstate travel *forbids special hindrances* of interstate movement.

> Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate [18 U.S.C.] § 241[, the criminal counterpart of § 1985(3)]. But if the *predominant purpose* of the conspiracy is *to impede or prevent the exercise of the right* of interstate travel, *or to oppress a person because of his*

fore effectuated *discrimination* between in-state and out-of-state patrons of abortion facilities, *id.* at 200, and this Court held that the law violated the Privileges and Immunities Clause of the Constitution, U.S. Const. art. IV, § 2, *see* 410 U.S. at 200. *Doe*, therefore, has no relevance to the present case. *See* Berrigan Amicus Brief § II(B) (distinguishing *Doe v. Bolton*).

[16] The court of appeals in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), erred, therefore, when it found a violation of the right to travel on the basis of the burdens—inconvenience, expense, and medical consequences—that may face out-of-state patrons who are unable to gain access to abortion facilities. *N.Y. State NOW*, 886 F.2d at 1360-61. These burdens depend upon the *distance* the patrons travel, and not upon whether patrons cross any state *borders*. The presence or absence of *interstate* travel is completely irrelevant, and therefore the right to interstate travel is not implicated.

> *exercise of that right*, then . . . the conspiracy becomes a proper object of the federal law . . . .

Guest, 383 U.S. at 760 (emphasis added).

Petitioners' alleged obstruction of access to abortion businesses simply does not implicate the federal constitutional right to interstate travel under any traditional understanding of that right. Such obstruction hinders *all* comers, whether from Virginia or from out-of-state. *See* JA 25 (Plaintiffs' Trial Exhibit 12: Affidavit of Randall A. Terry) ("while the child-killing facility is blockaded, *no one* is permitted to enter past the rescuers") (emphasis added). Respondents did not establish, and could not establish, that anti-abortion rescues single out interstate travelers, penalize out-of-state patrons because of their residence,[17] or block border passage. *Cf. Attorney General of New York v. Soto-Lopez*, 476 U.S. at 902, 903 (plurality opinion) (right to "interstate migration" implicated by action that "actually deters," has the "primary objective" of deterring, or uses a "classification which serves to penalize" *interstate* migration).

The goal and effect of petitioners' alleged activities were to stop abortion, regardless of the residency or travel history of any women seeking to abort. Under these circumstances, no right to travel is implicated.

Indeed, to adopt respondents' theory of the right to travel would be to arm interstate travelers with a discriminatory sword, instead of a shield *against* discrimination. According to respondents, a person who is blocked from entering a facility (or from passing along a street or sidewalk) would have a special *federal* cause of action if—but only if—that person was from out of

[17] In fact, an *intrastate* traveler from the far end of Virginia will plainly face greater inconvenience from an anti-abortion blockade in Alexandria than will an *interstate* traveler who resides just minutes away in the District of Columbia.

state. In-state residents, meanwhile, would be relegated to their usual tort remedies under state law. Furthermore, under respondents' theory, conduct which would otherwise be merely tortious obstruction would become a *federal violation* purely because of the incidental fact that some of the obstructed parties had come to the site of the tort from another jurisdiction. Blockading a McDonalds, for example, would be a federal constitutional tort just because interstate travelers sometimes patronize the facility. Such a claim is patently absurd.[18]

Respondents have established no more than the incidental fact that some patrons of Northern Virginia abortion facilities come from outside of Virginia. This fact, standing alone, does not convert all tortious obstruction at an abortion facility into a violation of a federal constitutional right to travel.

2. *Respondents have not established a violation of any right to abortion.*

The courts below declined to address respondents' claim that petitioners, though private actors, had violated a right to abortion. *See* 914 F.2d at 586 (Pet. App. 9a); 726 F. Supp. at 1493-94 (Pet. App. 31a-33a). Nor does this argument have any merit. "Section 1985(3) does not . . . protect individuals against private efforts to encroach on constitutional shields . . . that protect only against official conduct." *Roe v. Abortion Abolition Society*, 811 F.2d 931, 933 (5th Cir.) (citing *Scott*, 463 U.S. at 833), *cert. denied*, 484 U.S. 848 (1987).

Regardless of whether the abortion right announced in *Roe v. Wade*, 410 U.S. 113 (1973), retains any con-

[18] Furthermore, if anti-abortion sit-ins violate a federal constitutional right to travel, then so did the lunch-counter and college campus sit-ins of the 1960's and 1970's, and so will the sit-ins of the 1990's and 2000's—whatever the particular social cause may be. The right to interstate travel, however, is a safeguard of civil liberty—not a means for suppressing civil disobedience.

tinuing validity,[19] this asserted right simply does not apply to the case at bar. The *Roe* Court located a right to abortion in the liberty guarantees of the fourteenth amendment, and this amendment only applies against state action.

In *Roe v. Wade*, the Court held that the right of privacy "founded in the Fourteenth Amendment's concept of personal liberty and *restrictions upon state action*" includes a right to abortion. 410 U.S. at 153 (emphasis added). Based upon this holding, the Court sharply limited any "regulation by the State" or "interference by the State." *Id.* at 163.

The *Roe* Court's focus on *state* restrictions on abortion reflects the established principle that "[t]he Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*." *Carpenters v. Scott*, 463 U.S. at 831 (internal quotation marks and citations omitted; emphasis in original). As the majority observed in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), there is no constitutional objection where there is "' no *governmental* obstacle' " to abortion. *Id.* at 3052 (emphasis added) (quoting *Harris v. McRae*, 448 U.S. 297, 315 (1980)).

[19] As the district court observed, "the law concerning a putative abortion right is in a state of flux." 726 F. Supp. at 1494 (Pet. App. 32a) (footnote omitted). In light of the recent decision of this Court in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), the status of the abortion right set forth in *Roe v. Wade*, 410 U.S. 113 (1973), is highly uncertain. *See* 109 S. Ct. at 3056-58 (plurality opinion) (expressing willingness to abandon the trimester framework of *Roe*); *id.* at 3063 (O'Connor, J., concurring in judgment) (questioning the trimester framework of *Roe*); *id.* at 3064 (Scalia, J., concurring) (expressing willingness to overrule *Roe*); *id.* at 3067 (Blackmun, J., dissenting) (observing that *Roe* is no longer secure). *See also* Brief Amicus Curiae of National Right to Life Committee, Inc. §§ IV, V ("right to abortion" is a liberty interest, not a fundamental right).

In the case at bar, respondents have conceded the complete absence of any state action. As respondents' counsel said in his opening statement at trial, "we are not alleging and don't plan to prove State action, and we stand or fall on that." Trans. of Nov. 16, 1989 hearing (morning session) at 13. Hence, there can be no violation of any constitutional right to abortion, and no violation of § 1985(3).

Respondents frankly conceded at trial the absence of case authority in support of their claim: "Now, I will be very candid to say to the Court I do not have a case that directly supports my position . . . ." Trans. of Nov. 16, 1989 hearing (morning session) at 10 (statement of respondents' counsel John H. Schafer). Respondents also acknowledged to the court of appeals that every court that has addressed this issue has ruled contrary to respondents. Brief for Appellees and Cross-Appellants at 22, *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (Nos. 90-2606, 90-2607, and 90-2651), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). *See, e.g., Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 681 F. Supp. 688, 691 (D. Ore. 1988) (rejecting § 1985(3) claim predicated on abortion rights; U.S. Constitution does not protect privacy right from private interference); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582-83 (E.D. Pa. 1989) (rejecting § 1985(3) claim predicated on abortion right; showing of state involvement is an "essential element[]" of the claim); *Chico Feminist Women's Health Center v. Butte Glen Medical Society*, 557 F. Supp. 1190, 1197 (E.D. Cal. 1983) (rejecting § 1985(3) claim predicated on right to privacy; claim includes "a state action requirement"); *cf. New York State NOW v. Terry*, 704 F. Supp. 1247, 1260 (S.D.N.Y.) (noting that state involvement is a requirement for a § 1985(3) claim predicated on a right to privacy, but finding state involvement on the facts of the case), *modified and aff'd on other grounds*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). *See also Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986) (rejecting constitutional challenge to statutory ban on wrongful birth suits; right to abortion is not implicated by "purely private conduct" of doctor).

Thus, respondents are asking this Court to announce a novel constitutional doctrine by "discovering" a federal constitutional right to abortion that applies against purely private actors. Respondents' call for such a massive expansion of abortion jurisprudence is unwarranted and indefensible. *See generally* Brief Amicus Curiae of National Right to Life Committeee, Inc. § II(B) (history and precedent foreclose any argument that the ninth amendment to the U.S. Constitution secures a right to abortion). This Court must reject respondents' extraordinary claim that every private action that interferes with abortion is a federal constitutional tort.

In *Carpenter v. Scott*, this Court explicitly rejected the notion that "when the alleged conspiracy is aimed at a right that is by definition a right only against state interference the plaintiff in a § 1985(3) suit nevertheless need not prove that the conspiracy contemplated state involvement of some sort." 463 U.S. at 833. On the contrary, the Court held that when the relevant constitutional provision "restrains only official conduct, to make out their § 1985(3) case, it was necessary for respondents to prove that the State was somehow involved in or affected by the conspiracy." 463 U.S. at 833.[20]

[20] The dissenting opinion of eight judges (joined in relevant part by a ninth dissenter) of the court of appeals in *Scott v. Moore*, 680 F.2d 979 (1982), *rev'd*, 463 U.S. 825 (1983), is especially appropriate to the present case:

> The extension of § 1985(3) to protect against *private* infringement of every right protected against *governmental* action by the Constitution would create a *Bivens*-type tort action against

Respondents have not purported to show state action in the present case. Thus, their attempt to predicate a § 1985(3) claim upon a supposed right to abortion must fail.

II. RESPONDENTS' CLAIM UNDER 42 U.S.C. § 1985(3) IS TOO INSUBSTANTIAL TO SUPPORT FEDERAL SUBJECT MATTER JURISDICTION.

As demonstrated above, respondents' asserted bases for a federal cause of action are entirely meritless. When a federal claim is, like that of respondents, "'so attenuated and unsubstantial as to be absolutely devoid of merit,'" that claim cannot suffice to confer federal jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (quoting *Newberryport Water Co. v. Newberryport*, 193 U.S. 561, 579 (1904)). Hence, the courts below should have dismissed respondents' suit for lack of federal subject matter jurisdiction. *Hagans*, 415 U.S. at 537-38.

The district court in the case at bar forthrightly recognized that respondents' lawsuit "was, essentially, a simple trespass case only modestly complicated by an unsettled § 1985(3) issue." *NOW v. OR*, No. 89-1558-A, slip op. at 5 (E.D. Va. Feb. 13, 1990) (Pet. App. 46a-47a) (footnote omitted) (ruling of district court on attorney's fees). This "modest complication"—respondents' § 1985(3) claim—represented the sole basis for the invocation of federal subject matter jurisdiction. As a basis for federal jurisdiction, this claim is patently and woefully inadequate.

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every private conspiracy that affects a federal constitutional right. A citizen has a right to be secure in his property and home, but *we do not think that § 1985(3) confers a cause of action for a conspiracy by a person's neighbors to block his driveway in order to keep him from driving his automobile to his place of business.*

Id. at 1014 (footnote omitted; emphasis added in part).

As demonstrated above, *see supra* § I(A), respondents have completely failed to set out a claim of invidiously discriminatory class animus as required by § 1985(3). Respondents have not even alleged any facts to support a claim of hostility by petitioners toward women. Instead, respondents' claim of class-based, invidiously discriminatory animus rests entirely upon the artificial and improper creation of a class of "women seeking abortions" and the faulty and improper assumption that sincere opposition to the practice of human abortion is *per se* sex discrimination. As already demonstrated, each of these legal propositions suffers from obvious, major legal and logical deficiencies, with the net result that respondents' class animus claim is manifestly untenable and insubstantial.

Respondents' federal claim is also facially defective for a second reason: respondents have not presented any substantial claim that petitioners have violated or threaten to violate any right protectable under § 1985(3). *See supra* § I(B). Respondents urged that petitioners violated a right to abortion. But respondents conceded the absence of state action, a necessary predicate for any claim derived from *Roe v. Wade*, 410 U.S. 113 (1973). The suggestion that the United States Constitution forbids purely private action that hampers or threatens to hamper access to abortion—such as a mother's grounding of her pregnant daughter to prevent her from aborting, or a distraught husband's desperate blockade of his wife's entrance to the abortion operating room—is obviously frivolous. Respondents' alternative claim, resting upon an asserted right to interstate travel, is similarly insubstantial. As illustrated above, *see supra* § I(B)(1), respondents' claim boils down to an argument that any tort perpetrated against someone who happens to be from out of state, and any tort against a business which happens to serve some patrons from out of state, *ipso facto* becomes a violation of the federal constitutional right to

interstate travel. Such a patently meritless claim stretches the right to travel far beyond the constitutional breaking point; respondents' theory essentially would embrace a general federal law of torts. *See also* Berrigan Amicus Brief § IV(B) (concluding, after comprehensive review of precedents regarding the right to travel, that respondents' arguments are clearly foreclosed by previous decisions).

Respondents' claim under § 1985(3), then, "is so patently without merit as to justify . . . dismissal for want of jurisdiction." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70 (1978).[21]

III. THE AWARD OF COSTS AND ATTORNEYS FEES MUST BE VACATED.

Because the judgment in favor of respondents on their federal cause of action cannot stand, the award of costs and attorneys fees to respondents must likewise fall.

Respondents need not fail on *all* of their claims (i.e., state or federal) before this Court may disturb the award of attorney fees. Rather, this award must fall with the rejection of respondents' *federal* claims, even if respondents ultimately were to prevail on their pendent state claims. The courts are unanimous, in the Fourth Circuit and elsewhere, in holding that where a plaintiff loses on a federal fee-generating claim, while winning on a pendent state claim, no award of attorneys fees is available under 42 U.S.C. § 1988. *Bunting v. City of Columbia*, 639 F.2d 1090, 1095 (4th Cir. 1981); *Haywood*

[21] The mere fact that one solitary federal court of appeals—the Second Circuit, in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990)—and several district courts have sustained (in conflict with other federal courts, *see* Pet. for Cert. § I) claims similar to those of respondents does not strip this Court of the authority independently to scrutinize the substantiality of these claims. *See* Brief Amici Curiae of the Rutherford Institute et al. § II.

v. Ball, 634 F.2d 740, 743 (4th Cir. 1980); *McDonald v. Doe*, 748 F.2d 1055, 1056-57 (5th Cir. 1984) ("This circuit . . . has recently held that the plaintiff does not . . . prevail for fee purposes under 42 U.S.C. § 1988 when his constitutional claim is decided adversely to him even though he obtains recovery on a pendent state law claim, joining the other circuits that have considered the question and have unanimously reached the same conclusion") (footnotes and citations omitted) (and cases cited), *reh'g denied*, 753 F.2d 1075 (5th Cir. 1985); *Heath v. Brown*, 807 F.2d 1229, 1233 (5th Cir. 1987) (per curiam) ("a party who wins pendent state claims while *losing* all federal claims is not entitled to fees") (emphasis in original); *Raley v. Fraser*, 747 F.2d 287, 290-92 (5th Cir. 1984); *Reel v. Arkansas Dep't of Correction*, 672 F.2d 693, 697-99 (8th Cir. 1982); *Curia Brothers & Co. v. Allen*, 672 F.2d 347, 357-58 (3d Cir. 1982); *Russo v. State of New York*, 672 F.2d 1014, 1022-23 (2d Cir. 1982).

Thus, the meritlessness of respondents' claim for relief under 42 U.S.C. § 1985(3) requires the reversal of the award of attorneys fees to respondents.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment of the court of appeals.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a conspiracy to blockade medical clinics providing abortions and related services to women, substantial numbers of whom travel from other states, is a basis for a cause of action under 42 U.S.C. § 1985(3).

2. Whether, in any event, the district court properly exercised its discretion to assume pendent jurisdiction over respondents' related state law claims.

3. Whether respondents are entitled to attorneys' fees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-985

JAYNE BRAY, OPERATION RESCUE, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case involves a mass conspiracy to deny women the freedom to exercise their constitutional rights to privacy, and to engage in interstate travel and commerce, by means of physical blockades of medical facilities providing abortions and related advice and services to women. As the district court found, petitioners' blockades threaten women throughout the country by directly attacking women who seek to exercise their rights. By means of these blockades

petitioners hope "to dissuade women from seeking a clinic's abortion services [and] to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely." 726 F. Supp. 1483, 1488 (Pet. App. 20a).[1]

While petitioners imply that their conduct is akin to the peaceful lunch-counter sit-ins of the 1960's, nothing could be further from the truth. Petitioners attempt, not to assert their own legal rights as the sit-in demonstrators did, but to deny the rights of others. Thus, they do not assert the protections of law but instead thwart law by physically blockading targeted medical facilities, and disobeying requests of police to leave. Their conduct in the streets is mirrored by a similar contempt for the rule of law laid down by the courts. Trial testimony demonstrated that leaders of the blockades urged those attending a rally in Washington, D.C. to disregard federal court injunctions in the District of Columbia, Maryland and

[1] The court noted that blockades have occurred in five states in addition to the Washington Metropolitan Area. 726 F. Supp. at 1490 (Pet. App. 23-24a). *See also* trial transcript ("Tr.") 11, Nov. 16 pm (Ireland). Plaintiffs' trial exhibit ("Ex.") 5 (Tr. 84, Nov. 16 am (Dickinson-Collins); *id.* at 11-12) (on April 29, 1989, blockades in 46 cities, and medical facilities voluntarily closed in 17 other cities for fear of blockades); Ex. 16 (Tr. 23, Nov. 20 am).

Petitioner Operation Rescue provides "materials (videos, cassettes, literature, etc.) to help . . . organize and stage" such blockades, Ex. 1 (Tr. 82, 85, Nov. 16 am (Dickinson-Collins)), and holds national conferences to train people in blockade techniques. Tr. 7, Nov. 16 pm (Ireland).

"Pet. App." designates the Appendix to the Petition for Writ of Certiorari.

Virginia and to participate in blockades.[2] And in Maryland and the District of Columbia, several of the petitioners have been held in contempt of court for violating nearly identical federal court injunctions forbidding blockades.[3]

Federal law, through 42 U.S.C. § 1985(3), plainly affords a remedy for the deprivation of federal rights by the mob action that this record reveals. Here, there was (1) a conspiracy, (2) to deprive a protected category or group, (3) of equal access to rights protected by federal law against hostile private conspiratorial action. Where these three components are present, federal courts are authorized by Section 1985(3) to assist state and local authorities to ensure that members of historically vulnerable groups shall not be deprived of their equal enjoyment of the rule of law.

Proceedings Below

Respondents, plaintiffs below, are medical facilities in the Washington Metropolitan Area, and women's organizations representing their women members who may seek the services of such facilities.[4] They filed their complaint in the United States District Court for the Eastern District of Virginia on November 8, 1989, shortly before dates announced by Operation

[2] Tr. 71, Nov. 16 pm (Johnson).

[3] National Organization for Women v. Operation Rescue, No. N-89-3098 (D. Md. Nov. 15, 1990); National Organization for Women v. Operation Rescue, No. 89-2968-LFO (D.D.C. Jul. 30, 1990).

[4] Counsel state, pursuant to Rule 29.1, that none of the respondents that is a corporation has any parent or subsidiary corporation.

Rescue for blockades of Washington Metropolitan Area women's health clinics.

Respondents had originally filed a single complaint in the United States District Court for the District of Columbia. That court, hearing respondents' motion for a preliminary injunction, stated that it would grant an injunction but only one limited to the District. For that reason, separate actions had to be filed in Maryland and Virginia to enjoin the blockades threatened throughout the Washington Metropolitan Area.[5]

The Virginia complaint, in common with the complaints in the other two jurisdictions, alleged that petitioners, and others in concert with them, planned forcibly to preclude women and "women who seek the services of providers of abortions and related services" from exercising their constitutional rights to privacy and to the privileges and immunities guaranteed to all citizens, including the right to travel, in violation of Section 1985(3). J.A. 15-16. An accompanying motion for a temporary restraining order was granted after two days of hearings.

The hearing on respondents' motion for preliminary injunction began on November 16, 1989. At the outset, Judge T. S. Ellis III ordered that the trial on the merits be advanced and consolidated with the hearing on the preliminary injunction motion. Respondents presented numerous exhibits and the testimony of nine witnesses. Petitioners presented no evidence and have never filed an answer. The court granted the requested injunction from the bench and subsequently published its findings and conclusions.

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[5] The D.C. and Maryland actions are cited in note 3, *supra*.

J.A. 28 (oral opinion); 726 F. Supp. 1483 (Pet. App. 14a). The court acted both pursuant to Section 1985(3), finding that respondents' "members and patients constitute a subset of a gender-based class" that has "discrete, insular and immutable characteristics" entitling it to protection under that statute,[6] and upon pendent state law claims of trespass and nuisance. 726 F. Supp. at 1492, 1494-95 (Pet. App. 28-29a, 33-36a). The court concluded "that unless the threatened and unlawful acts to [respondent] clinics are immediately and permanently enjoined substantial and irreparable harm will be suffered by the [respondents] and their members and patients who seek the services of the clinics." *Id.* at 1490 (Pet. App. 25a). The court's injunction is scheduled to expire on September 24, 1991.

On appeal, the Fourth Circuit affirmed the district court in all respects by *per curiam* opinion. 914 F.2d 582 (Pet. App. 1a) (Wilkinson and Chapman, Circuit Judges; Anderson, District Judge). The court found

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[6] Numerous other courts have reached the same conclusion. *See, e.g.*, New York State NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); National Organization for Women v. Operation Rescue, Bo. 89-2968-LFO (D.D.C. Jul. 30, 1990); Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989); Aradia Women's Health Center v. Operation Rescue, No. 88-1539R (W.D. Wash. Jul. 7, 1989); Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989); Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa 1989), *aff'd on other grounds*, 919 F.2d 857 (3d Cir. 1990); *see also* National Organization for Women v. Operation Rescue, No. N-89-3098 (D. Md. Nov. 15, 1990). *But see* National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989), *appeal docketed*, No. 90-5519 (9th Cir. 1990).

that petitioners' activities "crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law." *Id.* at 585 (Pet. App. 8a). The court agreed with the district court that a "gender-based animus satisfies the 'purpose' element of § 1985(3)" (*id.*), and affirmed the district court's discretion to assert pendent jurisdiction and grant relief on the state law claims. *Id.* at 586 (Pet. App. 9a).

Statement of Facts

The enjoined blockades are an effort at mob intimidation. What the courts below have enjoined is not speech, distributing leaflets, peaceful demonstration, or symbolic expressive conduct designed to persuade women not to exercise their constitutional rights.[7] The district court observed that "[t]his is not a case of a clash of rights." J.A. 39. "I am reasonably confident . . . that we wouldn't be here today if it were simply a matter of defendants holding up placards or issuing invitations to people walking by on the sidewalk."[8]

Blockades of the kind that the district court enjoined have been perpetrated by petitioners and their co-conspirators in the Washington Metropolitan Area and elsewhere in the country. The court's injunction

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[7] While petitioners would characterize all they do as "rescues" and use "rescue" as a broad term encompassing speech activity (Pet. Br. 4-5), the fact is that the lower courts enjoined only petitioners' physical blockades.

[8] Tr. 28, Nov. 16 pm. Petitioners in fact shun political discourse. *See, e.g.*, Ex. 1, *supra* note 1 ("our political and educational efforts are too late"); Ex. 17 (Tr. 24, Nov. 20 am). Indeed, testimony at trial indicated that those who oppose abortion, but seek to outlaw it only through lawful means, are referred to as "wimps for life." Tr. 6, Nov. 16 pm (Ireland).

of future blockades was thus based not only on predictions of what would happen, but also on substantial evidence of petitioners' egregious conduct when they stage these blockades.

When petitioners stage a blockade, hundreds of people mob the doors of the selected clinic and prevent everybody—the women who are the clinic's patients and prospective patients, and the doctors, nurses, and others there to serve them—from entering. 726 F. Supp. at 1488 (Pet. App. 20a).[9] The women, indeed, may not even reach the barred doors. Clinic parking lots are rendered inaccessible; petitioners use such devices as parking a car in the middle of the entrance to a parking lot and letting the air out of its tires. *Id.* at 1489-90 (Pet. App. 23a).[10] Petitioners have also strewn nails on a clinic's parking lot and neighboring streets. *Id.*

Clinics in the Washington Metropolitan Area that have been blockaded or threatened with blockades provide many services for women, not limited to the performance of abortions.[11] Although petitioners profess a purpose solely of preventing abortions, women coming to a clinic even for emergency prenatal care are barred along with all the other patients.[12]

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[9] *See also* J.A. 22 (Ex. 1); Tr. 36, 59, Nov. 16 am (Dickinson-Collins) ("it's not just the abortion patients who cannot get in"); Tr. 51-52, Nov. 16 pm (Lt. King).

[10] Tr. 36-37, Nov. 16 am (Dickinson-Collins).

[11] *See, e.g.*, Tr. 5, 10, Nov. 16 pm (Dr. Williams). One clinic operator noted that the staff goes "very thoroughly through . . . all alternatives to a problem pregnancy" and provides "emotional counseling to see if [women considering abortion] are firm in their decision." Tr. 61, Nov. 16 am (Dickinson-Collins).

[12] Tr. 37, Nov. 16 am (Dickinson-Collins).

The district court found that, as a result of petitioners' blockades, women seeking abortions and counseling "are likely to suffer irreparable physical and emotional damage." *Id.* at 1496 (Pet. App. 22a). Abortion sometimes entails the insertion of a dilating device which, if not removed promptly when it is supposed to be removed, puts the woman at risk of "infection, bleeding and other potentially serious complications." *Id.* at 1489 (Pet. App. 21a). Prenatal patients, those suffering from complications resulting from abortion surgery, and those seeking crisis counseling also need immediate treatment.[13] If petitioners have mounted a blockade at a clinic, "patients requiring the . . . removal procedure or other vital medical services must either postpone the required treatment and assume the attendant risks or seek the services elsewhere." *Id.* And, as the district court added, "[u]ncontradicted trial testimony established that there [are] numerous economic and psychological barriers to obtaining these services elsewhere." *Id.* One witness testified that "women literally fall in the door crying . . . . Many times blood pressures have elevated."[14]

As the district court noted in the particular context of medical emergencies, many women cannot simply go to another clinic when they find that their own is blockaded. *Id.* Some of the procedures, particularly for later-term abortions, are performed at only a few clinics.[15] In addition, many of the women patients are

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[13] *Id.* at 59.

[14] *Id.* at 56; *see also id.* at 56-69.

[15] Tr. 31, Nov. 20 am (Lofton) (nearest clinics providing some abortion procedures are in New York and Georgia).

poor and cannot afford to go to a hospital for emergency care, "mak[ing] it difficult, if not impossible, for indigent patients to obtain necessary services from other facilities . . . ." *Id.* at 1489 n.3 (Pet. App. 21a n.3). Other women patients suffer economic harm from the inability to get treatment on the day of a blockade; many have made arrangements for child care and transportation that cannot be changed.[16]

In addition, the burdens on many of the women patients of these clinics are greater because they have traveled from out-of-state to patronize a clinic that provides the services they need. Twenty to thirty percent of the patients of one Northern Virginia clinic came from out-of-state. *Id.* at 1489 (Pet. App. 22a). Patients came to that clinic from, in addition to the District of Columbia and Maryland, Pennsylvania, West Virginia, New Jersey, New York, and Florida. *Id.*[17] Many women come from distant states to Northern Virginia clinics, and Washington Metropolitan Area clinics generally, because the service they need is not available near their home, either because no facility performs it, or because those that do are overburdened.[18] For example, one clinic in the Washington Metropolitan Area performs second trimester abortions up to the 26th week for documented cases of rape and incest; no other clinic in the area and very few elsewhere provide this service.[19]

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[16] Tr. 58, Nov. 16 am (Dickinson-Collins); Tr. 14-15, Nov. 16 pm (Dr. Williams).

[17] *See also* Tr. 68, 73, Nov. 16 am (Dickinson-Collins).

[18] Tr. 22, Nov. 20 am (Lofton) (*e.g.*, Manhattan and Baltimore facilities have waiting lists).

[19] *Id.* at 19-20, 31.

The clinic staff is also subject to physical intimidation. At a facility that was blockaded during the trial of this case, conspirators "started to bang on the trunk of [a physician's car and attempt] to turn the car over because someone identified him as a physician, and they also tore the emblem off of the front of his car."[20]

The blockades that took place at Washington Metropolitan Area clinics at the time this case was being tried provide an example of what all blockades mean for women and those who are trying to serve them. Five women scheduled to have dilation devices removed at one blockaded clinic were physically prevented from entering to undergo a timely removal. *Id.* at 1490 (Pet. App. 23a). They were trapped in a car surrounded by a mob of blockaders in the parking lot, and two of them began bleeding.[21] Two other patients had entered the clinic early and were trapped inside. One began to bleed, and because no doctors or nurses could get through the blockade, only a nurse's aide, who luckily had also entered the building early, was able to assist her.[22]

Local law enforcement authorities do not have the resources to prevent petitioners' blockades from having their intended effect of closing the clinics. *Id.* at 1489 n.4, 1496 (Pet. App. 22-23a n.4, 37a).[23] Petitioners do not let anybody but the leaders know in advance which clinic or clinics are going to be blockaded. *Id.*[24] Thus, they are able to mob a clinic without hindrance from local police. Once a blockade is in place, it often takes hours for the police to open a facility, as the blockaders must be carried away one by one. *Id.* at 1489-90 (Pet. App. 22-23a).[25] Petitioners are undeterred by the prospect of arrest.[26] Indeed, they repeat their blockades at the same clinics *despite* massive arrests.[27] The district court cited the example of Falls Church, a small community with a police force of only thirty deputies. *Id.* at 1489 n.4 (Pet. App. 22a n.4). When petitioners blockaded a clinic there, it was closed for six hours. *Id.* At a Maryland clinic, authorities asked the facility to close for the day when they were informed that a mob of blockaders was heading toward it.[28] Because the facility had to perform emergency procedures that could not be handled anywhere else in the area, it was not willing to close.

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[20] *Id.* at 25. The clinics themselves are also subject to serious physical depredations. At one clinic in Virginia, conspirators defaced signs and damaged fences on the facility property. That is the same clinic where they strewed nails over the parking lot and in neighboring public streets and blocked the parking lot with an immobile car. 726 F. Supp. at 1489-90 (Pet. App. 23a). Blocking of streets has resulted in auto accidents. Tr. 37, Nov. 16 am (Dickinson-Collins).

[21] Tr. 28, Nov. 20 am (Lofton).

[22] *Id.* at 38.

[23] *See also* Tr. 24, Nov. 16 pm (Ireland).

[24] *See also id.* at 53 (Lt. King); *id.* at 27 (Ireland).

[25] *See also id.* at 52-55 (Lt. King); *id.* at 24-25 (Ireland).

[26] Ex. 1, *supra* note 1 ("Rescuers are usually arrested, charged with a minor infraction, such as trespassing or disorderly conduct, and released the same day."); Ex. 17, *supra* note 8 ("In many cases like this in other movements, the officials did not arrest people because of the sheer numbers involved."); Tr. 73, Nov. 16 pm (Johnson) (Operation Rescue leaders held up as heroes for spending time in jail for blockading activity).

[27] Tr. 72, Nov. 16 am (Dickinson-Collins); *see* Tr. 48-57, Nov. 16 pm (Lt. King).

[28] Tr. 19-20, Nov. 20 am (Lofton).

The outnumbered police could do nothing, however, to prevent the closure, and the clinic was forcibly closed to its emergency patients and all others.[29] Even after it was opened, clinic staff had to escort distraught and bleeding women into the building, pushing their way through remaining blockaders who sought to block their access.[30]

SUMMARY OF ARGUMENT

The injunction issued below must be sustained on either federal or state law grounds, or both.

I.

A. The federal claim, based on Section 1985(3), requires proof of a conspiracy to deprive a class of persons of a federal right for invidiously discriminatory reasons. There is no issue here as to the existence of the requisite conspiracy. While this Court has not formally held that women are a class of persons entitled to the protections of Section 1985(3), that result is forecast by (1) prior opinions of this Court dealing with Section 1985(3) and related statutes, (2) the language of Section 1985(3), (3) the legislative history of the statute, (4) its basic purpose to provide protections to persons who may be victimized by pri-

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[29] *Id.* at 30, 33, 35, 38-39 (police could not provide safe passage into the facility for emergency cases or safe passage out for patients trapped inside). *See* 726 F. Supp. at 1489 n.4 (Pet. App. 23a n.4) (blockaders typically outnumber police). Even on the rare occasion when police receive "intelligence" about where a blockade will occur, petitioners' mob action overwhelms local resources. Tr. 53, Nov. 16 pm (Lt. King).

[30] Tr. 42, Nov. 20 am (Lofton).

vate actions directed at their rights, and (5) the unanimous conclusion of all those courts of appeal that have addressed the question of whether women are within the protection of Section 1985(3).

B. In this case, the enjoined activities have clearly been targeted at women. It is women, and only women, who can exercise the federally-guaranteed rights at issue in this case. That not all women will be in a position to, or choose to, exercise these rights is legally irrelevant, just as it would have been irrelevant in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), for defendants in that case to have offered to prove that not all Blacks were interested in exercising their civil rights.

C. As in *Griffin*, the requisite "invidiously discriminatory animus" is readily discernible from the facts of the case. To establish this element of the wrong, respondents are not required to prove that petitioners are misogynists, any more than plaintiffs in *Griffin* would be required to prove that defendants in that case hated all Blacks. "Animus" does not mean hostility, as both petitioners and the United States seem to understand. The word means "motive" or "purpose." The purpose here is to nullify or destroy certain federal rights of women. Petitioners' purpose to prevent the exercise of these rights is invidiously discriminatory for the same reason that the purpose in *Griffin* to punish or discourage the exercise by Blacks of their civil rights was invidiously discriminatory.

II.

Petitioners' blockades directly impact women's attempts to travel interstate to obtain abortions and related services, as well as their cognate right to

participate in interstate commerce in such services. These rights are incident to national citizenship and protected against hostile private action. The record here shows a far more substantial flow of travel and commerce than has been shown in many of the Court's cases, including *Griffin*, and, similarly, a far more sustained and substantial impact on that travel and commerce than has been present in the cases, such as *Griffin*, where a single episode of obstruction was sufficient.

III.

As to the pendent state law claim, there is no sensible basis upon which to argue that the district court's exercise of discretion to assert jurisdiction over this claim, affirmed by the court of appeals, was improper. The federal claim is clearly non-frivolous. It has been endorsed in this case by both lower courts. It has also been endorsed in virtually identical proceedings by the Second Circuit Court of Appeals, and by a number of federal district courts. There is no challenge to the holdings below that Virginia's laws had been, and were threatened to be, violated. There is no basis upon which the injunction may be set aside.

ARGUMENT

This case arises out of threats by an organized mob to use force to deny women the equal enjoyment of critical legal rights secured to them by the United States Constitution. The federal issue posed here is whether federal courts possess power pursuant to Section 1985(3) to protect women from such mob action. The district court and the court of appeals were

correct in finding that petitioners had alleged and proved all the elements of a Section 1985(3) claim.

The class is a class of women.[31] This is a valid Section 1985(3) class. The motive, or animus, of petitioners' conspiracy was directed against the class of women and the conspiracy would, if carried out, infringe upon the exercise of constitutional rights of women that are protected against private infringement.

I. RESPONDENTS HAVE ESTABLISHED A VALID CLASS OF WOMEN FOR SECTION 1985(3) PURPOSES AND INVIDIOUSLY DISCRIMINATORY ANIMUS DIRECTED AGAINST THAT CLASS

This Court has inferred from the terms of Section 1985(3) a requirement of "class-based, invidiously discriminatory animus behind" the actions of the conspirators against whose conduct Section 1985(3) provides a remedy. *Griffin* v. *Breckenridge*, 403 U.S. at 102. Plainly women are an identifiable, discrete group, or class, of persons. All that remains to be shown is that women constitute a class entitled to the federal protection against private conspiracies provided by Section 1985(3), and that the conspirators' animus was indeed "class-based" because the conspiracy was aimed at depriving that class of its rights.

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[31] Petitioners and the Government argue against a class defined as "women seeking abortion," but in so doing they misstate the issue. The question is whether petitioners have conspired to deprive women of certain constitutional rights by targeting those women who attempt to exercise those rights. See *infra* § I.B.; J.A. 15-16 (Complaint ¶¶ 39, 41).

A. Women Are a Class Within the Meaning of Section 1985(3)

The plain, expansive language of Section 1985(3), its context and legislative history, and its historic place as a measure to combat mob conduct that threatens the just and equal enforcement of the laws for members of vulnerable groups, all demand that this statute be applied to women. Indeed, neither the petitioners nor the Government argue that women are not a class for Section 1985(3) purposes.

The language of Section 1985(3) is broad and unconfining.[32] It encompasses conspiracies whose purpose is to deprive "any person or class of persons" of equal rights. On its face, the statute is not limited to protecting Blacks, or Blacks and the champions of their cause, though it was clearly the lawless treatment of the former slaves and their Republican allies in the Reconstruction Era South that inspired the legislation. Congress could have limited the reach of the statute to the evil that immediately inspired it, but it did not. The Court, in construing the criminal analogue of Section 1985(3),[33] has said that it "must accord it a sweep as broad as its language." *United States* v. *Price*, 383 U.S. 787, 801 (1966). The Court quoted that admonition when it rid Section 1985(3)

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[32] "If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . ." any person injured thereby shall have a cause of action. 42 U.S.C. § 1985(3).

[33] 18 U.S.C. § 241.

of a "state action" limitation that an earlier Court had read in without textual justification. *Griffin* v. *Breckenridge*, 403 U.S. at 97. The admonition is just as apposite to the issue posed here.

Furthermore, the near neighbor of Section 1985(3) in Title 42 is the familiar Section 1983. Both were enacted in 1871 as parts of the Civil Rights Act of 1871, known as the Ku Klux Klan Act. Ch. 22, 17 Stat. 13. They contain similar language.[34] As this Court knows, Section 1983 has been construed to protect a broad range of persons in addition to Blacks. Section 1983, like Section 1985(3), protects "persons" from deprivations of "rights, privileges, or immunities." Neither statute refers to race; nothing in Section 1983 suggests that its reference to "persons" is any broader than the "persons" referred to in Section 1985(3).

The Court has canvassed the legislative history of Section 1985(3), and of the Ku Klux Klan Act more generally, several times. *See, e.g., Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 370 n.7 (1979); *see also United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. 825, 834-37 (1983); *id.* at 850-53 (Blackmun, J., dissenting). That history confirms the

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[34] Section 1983 states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

breadth of the language and, in particular, supports the proposition that the class of women is within the protection of Section 1985(3).

An appropriate beginning point in the consideration of the history is the sweeping description of his legislation offered by Representative Shellabarger, the sponsor of Section 2 of the bill, from which Section 1985(3) is derived. He said that "the object" of the amended language of the section (which read much as the statute reads today) was "the prevention of deprivations which shall attack the equality of rights of American citizens"—all American citizens. Cong. Globe, 42d Cong., 1st Sess. 478 (1871). He added that "any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." *Id.*

In the same vein, Representative Wilson remarked soon after that, by the bill, Congress would "secure to all persons the equal protection of the laws." *Id.* at 481-82. He later expanded on the inclusiveness theme: "there is not of all the thirty-eight million of the citizens of this nation one so humble that his rights under the Constitution and the laws can be [ignored]." *Id.* at 484; *see also id.* at 485 (Rep. Cook). Others took up the theme. Representative Perce said that Congress sought to protect the rights of "citizens throughout the entire country, without regard to the condition, race, or party affiliation of the individual citizen." *Id.* at 512. Protection, said Representative Lowe, is to be given to "all classes in all states; to persons of every complexion and of whatever politics." *Id.* at 376.

The sponsors spoke not only in general of protection of American citizens, but of specific groups and persons, in addition to Blacks and their champions, whom the bill would protect. *See, e.g., id.* at 486 (Rep. Cook) and 336 (Rep. Kelley) (citizens of other states); *id.* at 517 (Rep. Shellabarger) and 571 (Sen. Ames) (Republicans); *id.* at 567 (Sen. Edmunds) (a Democrat, a Catholic, a Methodist, a Vermonter would be covered);[35] *id.* at 335 (Rep. Hoar) (Indian tribes).[36]

Finally, and directly apropos of this case, Representative Buckley stated that "[t]he proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well,

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[35] The well-known remark of Senator Edmunds of Vermont, concluding with the self-deprecating suggestion that even a conspiracy against a person "because he was a Vermonter" would be covered, was quoted by the Court as "not without weight" in United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. at 836-37.

[36] Many commentators have similarly concluded that Section 2 of the Ku Klux Klan Act reaches a broad range of conspiracies. These articles quote, at considerable length, statements made on the floor of Congress regarding this issue. They state, after reviewing the debate, that congressional intent was never narrowly limited to Blacks. *See, e.g.*, McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 Conn. L. Rev. 471, 486, 491 (1987); Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 Rutgers L. Rev. 515, 559-68 (1987); Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, B.C.L. Rev. 911, 929-33 (1986); Comments, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 Chi. L. Rev. 402, 407-11 (1979).

not the colored only, but the whites also; *yes, even women* . . . ." *Id.* at App. 190 (emphasis added).[37]

The legislation that is now Section 1985(3) was written to ensure that the promise of the equal protection of the laws was not negated by mob action. Section 1985(3) is tied by language and history to the Fourteenth Amendment and particularly the Equal Protection Clause. As originally enacted, the Ku Klux Klan Act of 1871 was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. The Equal Protection Clause, no doubt written principally to ensure equality of treatment of the newly freed slaves, has long since been held to protect other groups. Women are among the classes that have special protection. *E.g.*, *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723-26 (1982); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971). As this Court said in *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976), sex, like race, is an "obvious badge"; the Court emphasized "the pervasiveness of the historic, legal and political discrimination against women."

This Court assumed, without deciding, in *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366. that a conspiracy to discriminate in employment on the basis of sex came within Section 1985(3). The complainant

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[37] The Court of Appeals for the Third Circuit found in remarks of Senator Trumbull on "privileges and immunities" in Section 2 of the Act, Cong. Globe, 42d Cong. 1st Sess. 576, an "underlying premise . . . that women are within the reach of § 2." Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1242 (3d Cir. 1978) (*en banc*), *vacated on other grounds*, 442 U.S. 366 (1979).

there was a man who claimed to have been fired for supporting women who asserted that their employer had discriminated against them. The Court held that injury done by a conspiracy to violate the retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, could not also be redressed under Section 1985(3), even though literally included in that statute. The Court did not question that the complainant had alleged a conspiracy with the requisite "class-based, invidiously discriminatory animus." All of its analysis of the relationship of Section 1985(3) and Title VII was unnecessary unless there was a Section 1985(3) "class" of women to begin with.

Justice White, speaking for himself and two others, was surely justified, then, in stating in dissent that "the Court correctly assumes that the answer to this question [whether "discrimination on a basis other than race may be vindicated under § 1985(3)"] is 'Yes.' " *Id.* at 389 n.6. The dissent went on to say that "[i]t is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3)." *Id.*

The Court has professed to leave open the question "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." *Griffin* v. *Breckenridge*, 403 U.S. at 102; *see also United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. at 836, describing as "a close question" whether Section 1985(3) reaches classes other than Blacks and their champions. The Court in *Scott* was concerned that too expansive a reading of Section 1985(3), extending its coverage to groups whose only common ties were economic, would give it a reach

inconsistent with federalism. *See id.* at 836-39. The concern was not that Section 1985(3) might reach classes akin to "Negroes and those who championed their cause." Four Justices dissenting in *Scott* said that Congress intended to provide a remedy for any class of persons "whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities." *Id.* at 853 (Blackmun, J., dissenting). The dissenters went on to say "certain class traits, such as race, religion, sex, and national origin, *per se* meet this requirement." *Id.*[38]

There is thus every reason in text, context, history, and precedent for the Court to act here to make the *Novotny* assumption law. The class of women easily satisfies the requirement of the Court, as stated in *United Brotherhood of Carpenters & Joiners* v. *Scott*, that "the class must exist independently of the defendants' actions". 463 U.S. at 850.[39] Petitioners'

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[38] In both *Scott* and *Novotny* the Court expressed concern regarding the existence of more recently-enacted statutory schemes, specifically tailored to deal with the type of conduct challenged. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. at 372-78 (employment discrimination addressed under Title VII); United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. at 838-39 (union/employee relations addressed in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*). Use of Section 1985(3) in these cases thus might have disrupted an existing remedial scheme. By contrast, petitioners' conspiratorial campaigns of intimidation are not regulated by a more specifically tailored federal remedy, and they are precisely the sort of private deprivation of rights at which Congress was aiming in adopting Section 1985(3).

[39] Petitioners' attempt to pose such non-issues as whether persons "seeking alcoholic beverages," "animal rights proponents," etc. are valid classes should be unavailing. Pet. Br. 18.

speculation that construing Section 1985(3) to include gender-based discrimination "would be to open a statutory Pandora's Box" is unpersuasive. Pet. Br. 19 n.10. To recognize women as a class would create no intractable problems; the recognition of the right of Blacks and their champions to claim against private conspiracies under Section 1985(3), extended two decades ago, has not bred extensive litigation or otherwise caused difficulties. Every court of appeals that has considered the matter and attempted to forecast this Court's ruling has concluded that gender-based classes are within the protections of Section 1985(3).[40] This Court should affirm that judgment.

Respondents' class is not defined by an activity, as petitioners argue, Pet. Br. 17-18, but by immutable characteristics.

For this reason, petitioners' reliance on some language from Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975) is misplaced. Pet. Br. 18. The discrimination alleged there was between the plaintiff class, forced by the conspiracy to work for less than the federal minimum wage, and all other American workers. There was nothing to distinguish the plaintiff workers from all other American workers. That "the motivating animus must be created by a fact other than possession of the right deprived" (quoted at Pet. Br. 18), is simply an expression of the recognized maxim that the class must be defined in terms other than simply the identity of those injured by the conspiracy. *See also* Roe v. Abortion Abolition Society, 811 F.2d 931, 935 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987) (rejecting a Section 1985(3) claim where, according to plaintiffs, "the class in this case consists of those people who do not agree with [petitioners'] point of view.").

[40] New York State NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989) *cert. denied*, 110 S. Ct. 2206 (1990); Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988); Stathos v. Bowden, 728 F.2d 15, 20 (1st Cir. 1984); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235; Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978); *see* Browder v. Tipton, 630 F.2d 1149, 1154 (6th Cir. 1980).

B. Petitioners Conspired Against a Gender-Based Class

Petitioners' conspiracy is aimed at a gender-based class, a class of women. As Judge Ellis said, petitioners hope through their actions "to dissuade *women* from seeking a clinic's abortion services." 726 F. Supp. at 1488 (Pet. App. 20a) (emphasis added). A conspiracy to prevent women from obtaining the services of providers of abortions and related services, and from traveling interstate for such services, is a conspiracy against women.

Petitioners do not address whether their conspiracy is a conspiracy against women. Instead, their arguments focus on the irrelevant question whether Section 1985(3) protects a class defined by an activity, "seeking abortion," and not by its own characteristics.[41] The question is whether people conspire against women as a class when they target specifically those women who elect to exercise their constitutional rights respecting abortion and related services (including the right to travel interstate for such services) with a purpose to suppress exercise of those rights by women generally.

The answer to that question is "yes" because the capacity to bear children and the ability to undergo abortion, and the capacity to make decisions in respect thereto, link all the women who are the objects of the conspiracy and are a defining characteristic of being a woman. The Court recently recognized this principle in *International Union* v. *Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991), which dealt with Title VII of the Civil Rights Act of 1964. The respondent employer in effect barred women of childbearing capacity from certain jobs. This was, as the Court said, "a facial classification based on gender." *Id.* at 1202. The Court did not accept the argument that the employer's policy was gender-neutral, with merely a discriminatory effect on women (which would have entitled the employer to make defenses not available against a classification that discriminates on its face). *Id.* at 1202-03. Congress, to be sure, had specifically declared in the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, that, for purposes of Title VII, discrimination "because of or on the basis of pregnancy" is discrimination "on the basis of sex." The Court's conclusion that the employer's policy, on its face, effected a discrimination based on sex was not, however, dependent on that declaration. The Court referred to the Act only to say that its conclusion was "bolstered" by it. *Id.* at 1203. The Court's conclusion was that a private employer's discrimination against women with the capacity to bear children discriminated against women.[42]

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[41] Thus, petitioners' long argument that opposition to abortion is not the *per se* equivalent of discrimination against women is off the point. Pet. Br. 19-24. There is no claim that it is. Similarly, the United States argues that opposition to abortion is not opposition to women because abortion is "inherently different," citing Harris v. McRae, 448 U.S. 297, 325 (1980). United States Br. 6, 19. There is no attempt to show, however, what significance this "difference" has to the issues presented here.

[42] This Court saw in Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981), that legislation which classifies on the basis of a trait that, as a matter of biology, only one sex possesses makes a gender-based classification. California's statutory rape law prohibited "sexual intercourse accomplished with a female not the wife of the the perpetrator, where the female is under the age of 18 years." 450 U.S. at 466. The plurality

While *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), is much emphasized by the Solicitor-General, United States Br. 6, 16-19 (but not relied on by petitioners), it does not deal with the issue presented here—whether there is a gender-based class for purposes of Section 1985(3). *Geduldig* held that a denial of disability benefits to pregnant women was not unconstitutional under the Court's then still evolving gender/equal protection analysis. The Government relies heavily on the Court's statement that not all classifications on the basis of pregnancy are gender-based. Recent cases, however, indicate that that statement has little continuing relevance, at least outside the disability benefits context. *Johnson Controls* held that discrimination against fertile women is discrimination on account of sex. Surely there is no jurisprudential difference for this purpose between pregnant women and fertile women. *See Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 678 (1983) (Pregnancy Discrimination Act "unambiguously expressed [Congress's] disapproval of both the holding and the reasoning of the Court in . . . [*General Electric Co.* v. *Gilbert*], 429 U.S. 125 (1976), which expressly relied on *Geduldig* and followed the logic of *Geduldig*).[43]

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opinion, *id.* at 467-68, the concurring Justices, *id.* at 476, 483, and the dissenters, *id.* at 488, recognized that the statute effected a gender-based classification because only men could be charged under it, even though the statute did not in terms refer to the potential perpetrators of the crime as men or males.

[43] Both *Gilbert* and *Geduldig* were widely criticized by commentators. See the collection of (several dozen) citations in Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 983-84 nn. 107-09 (1984).

Petitioners' argument that they aim their conspiratorial activity only at women they perceive to be making a particular choice regarding their childbearing capacity does not negate the gender-based nature of their conspiracy. The fact that some women are not burdened by the conspiracy is immaterial. This is so for a number of reasons. First, a classification or policy that burdens some but not all women—for example, only women wishing to work in jobs where airborne lead may be a risk, or only women with children under the age of six who wish to work in the paid labor force—is gender-based even though many women are unaffected. *See International Union* v. *Johnson Controls, Inc.*, 111 S. Ct. 1196; *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). Indeed, many sex discrimination cases involve "subsets" of women or, as in *Phillips*, "sex-plus" discrimination. There is no requirement under the Constitution or any statute, including Section 1985(3), that a majority of women be affected before a governmental practice or private conduct may be analyzed as gender-based.[44]

The *Gilbert* and *Geduldig* cases deal only with *benefits* to employees, and both decisions were based on the finding that benefits were distributed equally between the sexes. By contrast, in Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977), the Court found discrimination where there was imposed on pregnant women "a substantial burden that men need not suffer." Here pregnant women plainly are not deprived of a "benefit," but rather suffer a substantial burden in denial of access to health care that men do not. As in *Johnson Controls*, the pregnancy-based classification is sex-based.

[44] It is irrelevant that one of the petitioners, Jayne Bray, is a woman. Her participation does not turn a gender-based conspiracy into a gender-neutral one.

Second, the choice being made by the women targeted by petitioners—to seek abortion or related services—is a constitutionally protected right of women as a class. In *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986), the Court emphasized that, when this right is denied, a woman is denied equality of treatment in respect of constitutional liberty:

> [The] promise [of individual liberty] extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision, with the guidance of her physician and within the limits specified in *Roe* - whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Singling some women out for the purpose of denying this right to all women, and the rights to travel and commerce necessary to effectuate it, is to conspire against women as a class.

Also, the fact that petitioners' conspiracy has an impact on some men does not negate the application of Section 1985(3). As this Court recognized in *Scott*, and as the legislative history confirms, a conspiracy against a protected class is no less class-based simply because supporters of the class that are not members of it are also affected by the conspiracy. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 487, 511, 517. The statute, at its very minimum, protects not just Blacks

but also protects "those who championed their cause" or "their supporters." *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. at 836. In *Novotny*, the Section 1985(3) claim was of discrimination against female employees of a savings and loan association, but the plaintiff was a man who "expressed support for the female employees" and was fired from his job. *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. at 369. Neither this Court nor the lower court in *Novotny* suggested that a conspiracy targeting women that also affected a man was, for that reason, not gender-based.[45]

The different effects of the conspiracy on women and men are also of significance. Even if men are indirectly affected, the true burdens of a clinic blockade are felt by women. Only they suffer the potentially serious health consequences of delayed or prevented abortion. Where women suffer "a substantial burden that men need not suffer," *Nashville Gas Co.* v. *Satty*, 434 U.S. at 142, as they do here, the challenged conduct is gender-based. Thus, petitioners' claim that, because their conspiracy affects some men, women cannot be the subject of the conspiracy is without substance.[46]

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[45] Similarly, in Loving v. Virginia, 388 U.S. 1 (1967), the Virginia statute punished both the Black and the white participant in an interracial marriage. The direct impact of the statute on whites in no way negated the fact the the statute discriminated against a group of Blacks. *See also* Michael M. v. Sonoma County Superior Court, 450 U.S. at 477 n.5 (Stewart, J., concurring) (treating a statutory rape law as a gender-based classification disadvantaging men even though women could be prosecuted for aiding and abetting).

[46] In Mississippi Women's Medical Clinic v. McMillan, 866 F.2d

Finally, the fact that the state and others may have an interest in the abortion decision (United States Br. 20) is not a reason for concluding that a conspiracy against women who have the right to make that decision is not a gender-based conspiracy for purposes of Section 1985(3). This case does not involve the right of the government to regulate abortion services or the public funding of abortions. This case involves the efforts of a private conspiracy to frustrate the rights of women who are in fact acting in *conformity* with the regulatory schemes adopted by the government.[47] *Harris* v. *McRae*, 448 U.S. 297, merely made clear that only the placement of a direct obstacle in the way of the exercise of a woman's privacy right

788, 794 (5th Cir. 1985), often cited by petitioners, the court assumed arguendo that "women of childbearing age who seek medical attention from the MWMC" defined a class for Section 1985(3) purposes, but went on to find that the allegations did not accurately define the dispute because defendants attempted "to dissuade *anyone* who contributes to the incidence of abortions" from doing so. *Id.* In so doing, the court did not acknowledge or take account of the legislative history, and statements of this Court, cited *supra*, which establish that a defendant may not be permitted to defeat the action by asserting that he also targets those who assist the targeted class.

The court's decision in *McMillan* may, in addition, have been affected by the fact that that case involved persons engaged in speech, not blockaders obstructing entrances. "The clinic offer[ed] no evidence . . . that the protestors *physically* restrained potential patients from entering the clinic." *Id.* at 791; *see id.* at 794.

[47] For example, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990), involves the government setting conditions on access to abortion services for some women. But in this case those conditions have been met; petitioners' conspiracy seeks to deprive women who have met these conditions from obtaining abortion services.

unconstitutionally burdens that right; simply failing to assist a woman in the exercise of the right, as by public funding of abortions, does not. Petitioners' blockades place just such a direct obstacle in a woman's path. Indeed, in a State where the legislature allows Medicaid funding of abortions, such as New York, petitioners' blockades prevent both Medicaid recipients and privately-insured women from obtaining access to clinics.

C. Petitioners' Activities Demonstrate an Invidiously Discriminatory Animus Against Women

An actionable conspiracy affecting a protected class under Section 1985(3) must be driven by an invidiously discriminatory animus against the class. As this Court stated in *Griffin* v. *Breckenridge*:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

403 U.S. at 102 (emphasis in original). Here, petitioners' conspiracy aims to deprive women of their right to make and carry out decisions respecting childbirth—constitutionally protected decisions about the most private of matters.

This is the requisite "animus or motivation," *Griffin* v. *Breckenridge*, 403 U.S. at 100, for Section 1985(3) purposes. Petitioners do not deny—they proclaim—that they want to prevent women from having

access to abortions and from seeking counseling and other related services. They choose to blockade clinics as a mob and intimidate the women patients rather than debating women about their choices and trying to persuade women to their view. Their assertions that they bear no ill will towards the women whom they frustrate in the exercise of their rights, and whose health they jeopardize, and that they oppose only the practice of abortion, do not avail them.

The animus requirement is not a requirement of hostility or ill will, as petitioners attempt to portray it.[48] In *Griffin* v. *Breckenridge*, the Court treated "animus" as a synonym for "motivation." 403 U.S. at 100. The common meaning of the word is "intention" or "objective." *See, e.g.*, Webster's Third New International Dictionary 89 (1986).

It is therefore irrelevant that petitioners protest their love and admiration for women, just as similar protestations regarding Blacks would have been irrelevant to the result in *Griffin*. Beneficent motives are also, of course, irrelevant to whether there has been discrimination based on sex, a point underlined by the Court in *Johnson Controls*, and made explicitly in *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973). The Court there spoke of the nation's "long and unfortunate history of sex discrimination" and said that "[t]raditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in

[48] The United States commits this same error, arguing there is no "animus" because the blockades "are conducted for a purpose other than animosity toward women." United States Br. 14.

a cage." The Court of Appeals for the Second Circuit has aptly remarked in a blockade-injunction case just like this one that "[t]he denial of ill-will towards the women they target and the claim that defendants' actions will benefit these women amount to an argument that 'we are doing this for your own good'; a contention that usually shields one's actual motive." *New York State NOW* v. *Terry*, 886 F.2d at 1360.

Most of what petitioners and their amici say by way of trying to refute the proposition that they entertained the required class-based animus is essentially: we are opposed to abortion, not to women. But, as demonstrated above, a conspiracy against a class of women of childbearing age, pregnant and seeking help, is a conspiracy against women. Thus the Second Circuit, responding to the same argument, noted that "[i]n most cases of invidious discrimination, violations of constitutional rights occur only in response to the attempts of certain members of a class to *do* something that the perpetrators found objectionable, such as [referring to *Griffin*] travelling interstate with the perceived purpose of promoting civil rights." *Id.* at 1359-60. After citing *Griffin*, the court continued, "[i]t is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights, but not against class members whose actions do not offend them." *Id.* at 1360.

It is difficult to see how the United States advances its cause by arguing that what creates "invidious discrimination against women *per se* is the *intent* to disadvantage women as a class of individuals." United States Br. 16 (emphasis in original) (citing *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979)). In

fact, the Fourteenth Amendment intent test is irrelevant here, not just because this case concerns a civil rights statute and not the Constitution,[49] but also because the *Feeney* test is relevant only to a case in which a facially neutral governmental practice has a disparate impact on a protected group that may or may not have been intended. *See Rogers* v. *Lodge*, 458 U.S. 613 (1982); *Personnel Administrator* v. *Feeney*, 442 U.S. 256. This case is not a disparate impact case. When, as discussed above, the conspiracy's aim is to close the doors of clinics to the women who are their patients, then the conspiracy is aimed—as intentionally as it could be—at those women patients.

These petitioners were moved by a class-based animus. The evidence persuaded the district court that petitioners "engaged in this conspiracy for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counseling services, of the right to travel." 726 F. Supp. at 1493 (Pet. App. 29-30a).[50] Instead of clubbing their victims, as the respondents did in *Griffin*, petitioners here would by the power of numbers and tactics of intimidation block the doors of medical facilities to keep women from patronizing those facilities. The result in each case is, as intended, a denial of equal protection and equal access to the privileges and immunities of federal citizenship to a class of citizens through physical coercion of a few.

[49] *See generally* Washington v. Davis, 426 U.S. 229 (1976) (distinguishing the intent requirement for equal protection analysis from the intent needed for Title VII).

[50] The statement is made under the heading "Conclusions of Law" in the district court's opinion, but it in substance is a finding of fact on a question of "discriminatory intent" or of "actual motive," which is reviewable, as this Court held in Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982), only under the "clearly erroneous" standard of Rule 52 of the Rules of Civil Procedure. *See also* Rogers v. Lodge, 458 U.S. at 622-23.

The animus driving petitioners' conspiracy was to deprive women of their constitutional right to elect abortion, and to employ interstate travel and commerce where necessary to exercise that right. There can be no question that such animus was directed at women and was "invidiously discriminatory."

II. RESPONDENTS HAVE ESTABLISHED A VIOLATION OF RIGHTS PROTECTED BY SECTION 1985(3)

Under Section 1985(3), there must be a deprivation "of the equal protection of the laws, or of equal privileges and immunities under the laws," or State authorities must be "prevented or hindered" from securing the "equal protection of the laws." The federal rights affected by petitioners' conspiracy are the right to travel and women's related right to engage in interstate commerce, and the right to privacy.

A. Petitioners' Activities Interfere with Women's Right to Travel and to Engage in Commerce

The district court found that the petitioners engaged in their conspiracy "for the purpose, either directly or indirectly, of depriving" women at whom the conspiracy was aimed "of the right to travel." 726 F. Supp. at 1493 (Pet. App. 29-30a). If that finding is treated, as it should be, as a formal finding of fact—made after the court heard three days of testimony on the merits—then there need be no signif-

icant argument under this heading. Petitioners do not assert that the court's decision was "clearly erroneous", and, as will be seen, they would not be warranted in making such an argument.

On the law, there is no doubt that the right to travel is one of the rights protected against private conspiracies by Section 1985(3). The Court held in *Griffin* v. *Breckenridge* that "the right of interstate travel is constitutionally protected, does not necessarily rest on the the Fourteenth Amendment, and is assertable against private as well as governmental interference." 403 U.S. at 105. It was therefore open to the petitioners in that case, on remand for trial, to prove that

> they had been engaging in interstate travel or intended to do so, that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons.

Id. at 106. Here it has been found that a substantial number of women have traveled or intended to travel interstate to patronize the blockaded clinics and, as the district court found, the right to do this was one of the rights meant to be discriminatorily impaired by the conspiracy. 726 F. Supp. at 1493 (Pet. App. 29-30a).

Even if the district court's finding is not taken as conclusive, it is clear that petitioners' conspiracy would infringe women's rights to travel and to engage

in commerce. This Court has repeatedly recognized the constitutional right to travel as a federal basis for forbidding private acts of invidious discrimination, even though protection of the right to travel was not the primary purpose of the statute involved or the primary target of the private parties against whom the action was brought. It has done so in *Griffin* v. *Breckenridge* with respect to Section 1985(3); in *United States* v. *Guest*, 383 U.S. 745 (1966), with respect to a companion criminal statute; and in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), with respect to the public accommodations provisions of the Civil Rights Act of 1964.

Both the right to travel and the related right to engage in interstate commerce are fundamental incidents of United States citizenship. "The right to interstate travel is a right that the Constitution itself guarantees . . . [and] is a right secured against interference from any source whatever, whether governmental or private." *United States* v. *Guest*, 383 U.S. at 759-60 n.17. Similarly, "[t]o carry on interstate commerce is . . . a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." *Crutcher* v. *Kentucky*, 141 U.S. 47, 57 (1891); *see also, e.g., Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870) ("right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation."). The right to engage in interstate commerce is one of the "rights, privileges, or immunities" protected by Section 1983. *Dennis* v. *Higgins*, 111 S. Ct. 865 (1991). Like the right to travel, it is secured against

interference from private as well as governmental sources. *In re Debs*, 158 U.S. 564 (1895).

This Court has indicated that the right to travel is infringed by inhibitions on travel across state borders in order to obtain abortion services. In *Doe* v. *Bolton*, 410 U.S. 179 (1973), this Court stated that women patients traveling from out-of-state to Georgia to obtain abortion services are protected. The Court said that the right to travel "must . . . protect persons who enter Georgia seeking the medical services that are available there." *Id.* at 200. In *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975), the Court declared that Virginia could not "prevent its residents from traveling to New York to obtain those [abortion] services," citing *Guest, Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and *Doe* v. *Bolton*.[51]

In this case the conspiracy would unquestionably inhibit women from traveling to Virginia to obtain abortion services. The provision of abortion services is intimately linked, much more than the provision of other medical services, to interstate travel. As this Court is aware, state laws vary greatly in the restrictions they place upon abortion. Women in jurisdictions with more restrictive laws than Virginia's will travel to Virginia to obtain abortion services. In addition, some clinics provide services not generally available from other clinics. The trial record shows that a suburban Maryland clinic would, in documented

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[51] The United States labors at length to use this one-line statement from *Bigelow* as authority for the proposition that "nonpurposeful", "indirect" restraints on travel do not invade the right. United States Br. 28-29. On a fair reading, no such negative interference could possibly be drawn.

cases of rape or incest, provide late second trimester abortion services; women will travel from out-of-state for these services because the nearest clinics providing them are in New York and Georgia.[52]

On the basis of the trial record, the district court found that

> [s]ubstantial numbers of women seeking the services of clinics in the Washington Metropolitan area travel interstate to reach the clinics. For example, approximately twenty (20) to thirty (30) percent of patients served at the Commonwealth Women's Clinic in Falls Church, Virginia come from out of state. Records for these patients reflect permanent residence addresses in Maryland, the District of Columbia, Pennsylvania, Texas, West Virginia, New Jersey, New York, and Florida.

726 F. Supp. at 1489 (Pet. App. 22a). Testimony was also received regarding a blockade of a clinic in Maryland; at that clinic "a majority of the patients travel from out of state." *Id.* Petitioners clearly knew that a substantial portion of the women affected by their blockades had traveled interstate to get to the barred clinics.[53]

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[52] Tr. 31, Nov. 20 am (Lofton); see also Brief of Amici Curiae National Abortion Federation, et al.

[53] The United States District Court for the Southern District of New York had in January 1989 noted the high incidence of interstate travel to reach abortion clinics well before this Virginia litigation. *See* New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989). Petitioners Operation Rescue and Terry were defendants in that litigation.

The impact on travel shown by this record is clearly more direct, sustained, and substantial than could have resulted from the one episode in *Griffin* v. *Breckenridge*, where one car was pulled over on the highway. 403 U.S. at 89-91. The cases in which this Court has found interference with the right to travel from discrimination occurring at local restaurants and motels that served both in-state and out-of-state residents are also relevant. In *Heart of Atlanta Motel, Inc.* v. *United States*, an Atlanta motel refused to accommodate Blacks, both residents and non-residents. The Court found "overwhelming evidence that discrimination by hotels and motels impedes interstate travel." 379 U.S. at 253. In the companion case of *Katzenbach* v. *McClung* the Court noted "an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes." 379 U.S. at 300.

The clinics in this case, like the motels and restaurants, are doing business in one locale. As in those cases, access to a facility is blocked both for residents and for non-residents. Like the motel and restaurant cases of the 1960's, the denial of access to these facilities causes a material impairment of the right to travel, and of the related right of the travelers to engage in interstate commerce. No meaningful distinction may be drawn between the impact of petitioners' activities on these constitutional rights and that found in *Griffin*, *Heart of Atlanta Motel*, *Katzenbach* v. *McClung*, and similar cases.[54]

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[54] Petitioners argue that the right to travel should not be recognized in this case because many businesses are located on interstate travel routes, or close to state borders. Pet. Br. 25.

There is nothing in this Court's decisions that suggests that the constitutional right to travel asserted in this case is not impaired by petitioners' blockades of clinics routinely serving persons from out-of-state. Petitioners are plainly wrong in attempting to limit the travel right to "interstate migration" as opposed to "mere physical movement" (Pet. Br. 26), and are also wrong in asserting that, "[i]f the obstacle in question applies to *both* interstate and intrastate travelers, then the right to interstate travel is not implicated". *Id.* at 27. The cases discussed above uniformly refute these simplistic arguments.

The Government is also wrong in asserting that, in the absence of discrimination against an interstate or out-of-state traveler, the right to travel is infringed by a Section 1985(3) conspiracy only when a defendant specifically intends to violate that right. United States Br. 25. This argument ignores the trial court's factual finding that there was a purpose to deprive women of the right to travel, 726 F. Supp. at 1493 (Pet. App. 29-30a), and it ignores the Court's statement in *Griffin* v. *Breckenridge* that the "motivation aspect of Section 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." 403 U.S. at 102 n.10.[55] Consistent

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However, the incidence of concerted denials of the right to travel to classes of persons for invidiously discriminatory reasons is surely not great, as evidenced by the paucity of right to travel cases since *Griffin* and *Guest* defined its scope in this context. In any event, and whatever may be its incidence, there is no reason at all why federal law should not be applied when such a deliberate federal wrong occurs.

[55] *See also* Monroe v. Pape, 365 U.S. 167, 187 (1961) (noting the absence of such an intent requirement for Section 1983, and

with that statement, the Court, in listing the things it was open to the plaintiffs to prove on the remand to make their case (*id.* at 106), listed the alternatives in the disjunctive: it would be enough if plaintiffs proved that "they had been engaging in interstate travel or intended to do so" *or* if they proved that the conspirators meant to impair plaintiffs' right to travel, to drive plaintiffs' out-of-state driver from the state, or to deter the plaintiffs from associating with him. The Government limits its quotation from *Griffin* so as to omit the Court's first test listed above. United States Br. 25. This test is incompatible with the Government's argument that petitioners must be shown to have intended to prevent interstate travel.[56]

B. Petitioners' Activities Also Interfere with the Right to Privacy

Respondents have also relied upon petitioners' deprivation of their right of privacy to state a cause of action. However, neither the district court nor the court of appeals reached the privacy claim because it was not necessary for them to do so. 726 F. Supp. at 1493-94 (Pet. App. 31-33a); 914 F.2d at 586 (Pet. App. 9a). Accordingly, there have been no decisions below on this claim, and no question relating to it

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that a person is "responsible for the natural consequences of his actions").

[56] The reliance of petitioners and of the Government on the intent language in United States v. Guest, 383 U.S. at 760, is misplaced, since that was a criminal prosecution. Pet. Br. 28-29; United States Br. 26. *Guest* relied on Screws v. United States, 325 U.S. 91 (1945), which was also a criminal prosecution, and one in which the relevant statute only penalized acts "willfully" depriving a person's rights. This Court, in Griffin v. Breckenridge, pointed out the inapplicability of the "willfulness" test of *Screws* in a Section 1985(3) case. 403 U.S. at 102 n.10.

was presented in the petition for certiorari. Respondents therefore agree with the suggestion made by the United States that the Court need not review respondents' right to privacy claim at this time. United States Br. 10 n.10.

Unless the Court finds that the injunction cannot be supported on either a federal basis or a pendent state basis, the judgment below will be affirmed. If this result is not reached, it would then be appropriate to remand for full briefing and decision of respondents' right to privacy claim. At that time respondents would present a number of contentions respecting this claim.

The second clause of Section 1985(3) provides for a remedy when a conspiracy to deprive the right to privacy (even if by purely private actors) has hindered the State in its obligation to secure the equal protection of the laws to all persons.[57] In this connection, the trial court found that petitioners, by means of their blockades, had hindered the police in securing to women their right to privacy, as well as in securing to respondent clinics their rights to be free from state law violations. On the basis of testimony from, among others, a lieutenant in the Falls Church Police Department, the court found:

> that the Falls Church Police Department consists of thirty (30) deputized officers. Typical of most "rescue" demonstrations, the rescuers outnumbered the Falls Church police officers on the scene that day. Even though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for

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[57] See Brief of Amicus Curiae, City of Falls Church.

> more than six (6) hours. Limited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a facility for some period of time.

726 F. Supp. at 1489 n.4 (Pet. App. 22-23a n.4). One clinic was closed for eleven hours. *Id.* at 1490 (Pet. App. 23a). Falls Church police must seek assistance as well from the Arlington County Sheriff's Department, the Arlington County Police Department, the Virginia State Police, and at times the Virginia Department of Corrections in order to deal with the petitioners' blockades.[58]

In addition, proper application of the *Scott* decision to a right to privacy claim would have to be considered under the first clause of Section 1985(3). Contrary to petitioners' suggestion (Pet. Br. 31-34), the Court there did not require proof of "State action"; rather the Court merely indicated that "it was necessary . . . to prove that the State was somehow involved in or affected by the conspiracy." *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. at 833. The proof on this record demonstrates such an "effect on" the State, or "involvement of" the State. In addition, respondents contend that Section 1985(3) protects against private interferences with federal rights, regardless of the source of those rights, and therefore that as a matter of statutory construction neither "State action" nor "State involvement" is required for a Section 1985(3) claim implicating a federal constitutional right. *Id.* at 841 (Blackmun, J., dissenting).

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[58] Tr. 52, Nov. 16 pm (Lt. King).

Finally, as *Griswold* v. *Connecticut*, 381 U.S. 479, 484-88, 493 (1965), suggests, the constitutional source of the right to privacy, like the source of the right to travel, may be such that respondents are not required to allege and prove either state action or state involvement in a Section 1985(3) action.

III. THE DISTRICT COURT'S DISCRETIONARY EXERCISE OF PENDENT JURISDICTION WAS PROPER

Pendent jurisdiction is properly assumed so long as the federal questions raised in the complaint are "substantial" and the state and federal law claims "derive from a common nucleus of operative fact." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Petitioners challenge only the district court's conclusion that respondents' federal claims are substantial.

In order to be "substantial," a federal claim need not ultimately prevail. There must merely be "substance sufficient to confer subject matter jurisdiction on the court." *Id.* (citing *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103 (1933)). As petitioners concede, the exercise of pendent jurisdiction is only improper if the federal claim is "absolutely devoid of merit," *e.g.*, if " 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " *Id.* at 105-06 (quoting prior precedent). *See also Oneida Nation* v. *County of Oneida*, 414 U.S. 661, 666-67 (1974).

Here this test is obviously met. No prior cases of this Court even suggest the federal claim is without merit, much less frivolous. No federal claim is frivolous that has been explicitly endorsed by two courts

of appeals and seven district courts. These lower court decisions dealt with the same tactics, organized by the same leaders, that are in issue here. While petitioners label this federal claim with various pejoratives, they never explain how a federal claim with the judicial endorsements that this one has can possibly be called "patently meritless," "patently and woefully inadequate," etc. Pet. Br. 34-36.

In these circumstances, the judgment below, resting as it does on threatened violations of Virginia trespass and public nuisance law as well as of Section 1985(3), must be affirmed.

IV. THE AWARD OF ATTORNEYS' FEES WAS PROPER

Petitioners' challenge to the award of attorneys' fees rests on the argument that respondents should not prevail on any of their claims. Since this argument is without merit, the attorneys' fees award should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?
2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?
3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?
4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?
5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents contend that opposition to abortion *per se* represents "invidiously discriminatory class-based animus" for purposes of 42 U.S.C. § 1985(3), and that any interference with mere physical movement violates a federal constitutional right to interstate travel. These claims are plainly meritless. *See* Brief for Petitioners § I. Indeed, respondents' claims do not even suffice to support federal subject matter jurisdiction. *Id.* § II.

The arguments set forth in the answering Brief for Respondents do not alter this conclusion.

STATEMENT OF THE CASE

It is indicative of the weakness of respondents' legal arguments that respondents devote a full twelve pages of their brief to an argumentative statement of the case.

Brief for Respondents at 1-12. Respondents' extended description of various incidents, in various locations, involving various unspecified persons,[1] appears calculated to portray the anti-abortion "rescue" movement in general in a very negative light[2]—as if that would compensate for legal deficiencies in respondents' cause of action.

In the opinion of respondents, direct intervention to stop abortions from taking place is a terrible thing. Such a view is perhaps not surprising, coming as it does from organizations that feel no compunction in describing the abortion of an unborn child "up to the 26th week" of pregnancy as a "service." Brief for Respondents at 9. Petitioners, however, take the opposite view. Petitioners regard *abortion itself* as a terrible thing, as the unjust execution of a child and the exploitation of that child's mother. *See, e.g.*, Plaintiffs' Exhibit 1 (Operation Rescue literature).

The task for this Court, however, is not to decide whether petitioners' cause is worthy or whether the tactics of anti-abortion "rescuers" are unseemly.[3] The issue,

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[1] Respondents make no attempt to identify any connection between particular petitioners and the incidents recounted. Instead, respondents make generic reference to unidentified "conspirators," Brief for Respondents at 10, to "a mob of blockaders," *id.* at 10-11, and to "petitioners," *id.* at 7-8, 10-11, as apparently interchangeable terms for all who take part in anti-abortion "rescues."

[2] Respondents charge that petitioners "attempt, not to assert their own legal rights as the sit-in demonstrators [of the 1960's] did, but to deny the rights of others." Brief for Respondents at 2. This polemical claim completely ignores the possibility that there might be a different side to the abortion debate—namely, a genuine concern to protect the right to life of unborn children. While respondents obviously do not share petitioners' pro-life beliefs, this does not mean that respondents cannot acknowledge that petitioners honestly embrace a fundamentally different understanding of abortion. Were respondents to acknowledge this possibility, of course, respondents' claim that opposition to abortion intrinsically reflects anti-female animus would collapse.

[3] It is perhaps worthy of note that even respondents' efforts to select the worst examples of "rescue" behavior still reveal no such violence as was found in *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983). In *Scott*, the defendants "assaulted and beat [construction] employees, and burned and destroyed construction equipment," *id.* at 828—but this Court nevertheless ruled that, *for legal reasons*, § 1985(3) did not apply to defendants' conduct.

rather, is whether a specific federal statute—42 U.S.C. § 1985(3)—applies to this case. For the reasons set forth in the Brief for Petitioners, the answer is clearly "no."

ARGUMENT

I. RESPONDENTS ARE NOT ENTITLED TO RELIEF UNDER 42 U.S.C. § 1985(3).

As demonstrated in petitioners' opening brief, respondents' claim under 42 U.S.C. § 1985(3) suffers from two fatal defects; failure to establish an "invidiously discriminatory class-based animus," and failure to establish a violation of a right protected under § 1985(3). Respondents' brief provides no remedy for these defects.

A. Respondents Have Not Established the Requisite Class-Based Animus Under § 1985(3).

Respondents acknowledge that a claimant under § 1985(3) must establish the existence of an "invidiously discriminatory, class-based animus" behind the alleged wrongful conduct of the conspirators. *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 834-35 (1983). There are two parts to this requirement: identification of a cognizable class, and proof of a discriminatory animus against that class.

Respondents cannot satisfy this statutory requirement. "Women seeking abortions" is not a valid class under § 1985(3); moreover, opposition to abortion is not the *per se* legal equivalent of animus against women. *See* Brief for Petitioners § I(A).

1. *"Women seeking abortions" is not a valid class under § 1985(3).*

As petitioners explained in their opening brief, "women seeking abortions" is not a valid class, but rather is a contrived effort to portray opposition to an *activity*—the practice of human abortion—as opposition to a *class*.

Respondents have apparently decided to abandon their claim that "women seeking abortions" is a valid class under § 1985(3). *See* Brief for Respondents at 15 n.31. This strategic maneuver, however, runs contrary to the heavy emphasis placed upon a class of "women seeking abortions" in respondents' complaint, *see, e.g.*, Amended Complaint ¶¶ 1, 2, 26, 39, 41 (J.A. 6-7, 12, 15-16), in the opinion of the district court, 726 F. Supp. at 1492-93 (Pet. App. 29a, ¶¶ 34, 35), and in the opinion of the court of appeals, 914 F.2d at 584-85 (Pet. App. 5a-7a).[4]

By forswearing reliance upon an animus against "women seeking abortions," respondents have now chosen to rest their claim entirely upon a theory of animus against the class of women in general.[5] This Court, however, need not reach the question whether, or under what conditions, women can form a class under § 1985(3).[6]

[4] The exact phrasing of this class varies somewhat. As times respondents employ more cumbersome language, such as "women who seek the services of providers of abortions and related services," Amended Complaint ¶ 39 (J.A. 15). The phrase "women seeking abortions" serves as a convenient shorthand. *E.g.*, 726 F. Supp. at 1492 (Pet. App. 29a) (parenthetical description of holding, in another case, as "§ 1985(3) covers women seeking abortions"). Of course, respondents' alternative, more expansive (and awkward) descriptions of the supposed class pointedly illustrate the essential artificiality of the class respondents have proposed.

[5] Respondents had previously argued in the alternative, claiming a class either of women seeking abortions or women in general. *See* Amended Complaint ¶¶ 39, 41 (J.A. 15, 16) (alleging animus directed "at women and at women who seek the services of providers of abortions and related services").

[6] In arguing that women are "persons" under § 1985(3), Brief for Respondents at 16-20, respondents miss the point. Certainly

Even if women in general could form a valid class,[7] respondents' claim would fail for lack of any showing of *animus* against women.

women can be targets of illegal activity under § 1985(3)—the statute does not provide a remedy exclusively for black *men* who encounter racially discriminatory conspiracies. The statutory question, however, is not "Who are '*persons*'?" but "What is a '*purpose* of depriving' someone 'of the *equal* protection of the laws, or of *equal* privileges and immunities'?"

The "class animus" requirement derives from the phrases "equal protection" and "equal privileges and immunities" in the amended text of § 1985(3). *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). These phrases have a strong historical association with the concern for *racial* justice that motivated the constitutional amendments and civil rights legislation of the Reconstruction Era. To equate "gender" with "race" for purposes of "equal protection" would be to disregard this history and to ignore both logic and precedent. For example, this Court has held that a law imposing *racial* restrictions on marriage violates the equal protection of laws. *Loving v. Virginia*, 388 U.S. 1 (1967). But this Court has never suggested that a law imposing *gender* restrictions on marriage would violate equal protection. Indeed, it would be preposterous to claim that the framers of § 1985(3) or the fourteenth amendment believed that "equal protection" required the legal recognition of homosexual "marriages." Nor can respondents seriously contend that the myriads of people throughout history who would never think of marrying anyone other than a member of the opposite sex have somehow been guilty of "invidiously discriminatory class-based animus." In other words, while racial criteria presumptively reflect invidious prejudice—and thus unequal protection—gender distinctions are in many ways part of the essential fabric of society. Unthinkingly to equate racial categories with gender categories for purposes of federal statutory or constitutional guarantees of civil rights is to blink at reality.

[7] Respondents cite to the legislative history of the Civil Rights Act of 1871 in an effort to "prove" that § 1985(3) applies to gender-based animus. Brief for Respondents at 18-20. Respondents omit, however, certain key facts that negate the relevance of the comments respondents have selected.

For example, respondents quote Representative Buckley as stating that "'[t]he proposed legislation . . . is not to protect the colored only, but the whites also; *yes, even women . . .*'" Brief for Respondents at 19-20 (quoting Cong. Globe, 42d Cong. 1st Sess. App.

2. *Opposition to abortion is not the legal equivalent of discrimination against women.*

Respondents have not questioned the fact that the true, sincere motivation of Jayne Bray and her fellow petitioners is genuine opposition to the killing of unborn

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190 (1871)) (emphasis added by respondents). The passage from which respondents extract Rep. Buckley's comments is as follows:

> The proposed legislation is not intended to be partisan in its beneficent operations. It is not to protect Republicans only in their property, liberty, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women and children, all races and all classes, will be benefited alike because we are simply contending for good government and righteous laws.

The "legislation" in question was the entire civil rights act, which included the future 42 U.S.C. § 1983. *See Briscoe v. LaHue*, 460 U.S. 325, 336-37 (1983). There is no "class animus" requirement for § 1983; hence, broad comments about the scope of "the legislation" are useless in determining what classes § 1985(3) protects. *More importantly, Rep. Buckley's comments were made before the limiting amendment that produced the final version of § 1985(3) was even offered to the bill.* (Rep. Buckley made his comments on April 3, 1871. Cong. Globe, 42d Cong. 1st Sess. App. 190. The limiting amendment was offered on April 5. Cong. Globe, 42d Cong. 1st Sess. 477.) The "class animus" requirement of § 1985(3) derives directly from the limiting amendment. *See Griffin v. Breckenridge*, 403 U.S. 88, 100-02 (1971). Rep. Buckley's general, pre-amendment comments about the entire civil rights bill, therefore, have no relevance whatsoever to the specific, post-amendment "class animus" requirement of § 1985(3). Respondents' quotation of these remarks, with the claim that Rep. Buckley's words are "directly apropos of this case," Brief for Respondents at 19, is seriously misleading, to say the least.

The excerpts respondents have quoted from Rep. Lowe, Cong. Globe, 42d Cong. 1st Sess. 376, also predate the limiting amendment (Mar. 31, 1871). The quotations from Reps. Wilson (*id.* at 481, 484) and Perce (*id.* at 512) are general comments with no specific reference to the relevant terms of the limiting amendment. The quotations from Rep. Shellabarger (*id.* at 478) and Sen. Edmunds (*id.* at 567) already appear in the decisions of this Court in *Griffin* and *United Brotherhood of Carpenters v. Scott*. This Court has not found their remarks to provide decisive support for an expansive view of the classes protected under § 1985(3). *Scott*, 463 U.S. at 837.

children by abortion. The record uniformly reflects this proposition, *see* Brief for Petitioners at 20-22 (citing evidence and findings of fact), and respondents have not produced a scrap of evidence to the contrary. Respondents' claim, therefore—and the judgment of the court below—necessarily rest upon the assertion that opposition to abortion is, as a matter of law, the *per se* equivalent of animus against women. This assertion, however, merely reflects the highly controversial ideology of respondents; as such, it cannot serve as a basis for imposing liability under § 1985(3).

Respondents now concede that "opposition to abortion is not the *per se* equivalent of discrimination against women," Brief for Respondents at 24 n.41. Given the total absence of any evidence of gender-based animus, however, this concession is tantamount to an acknowledgement that respondents have no federal cause of action, and that the court below erred in affirming respondents' claim under § 1985(3). *See* Brief for Petitioners at 20-24.

Respondents nevertheless persist in arguing that efforts to prevent abortion necessarily reflect an animus against women. Brief for Respondents at 24-35. No explanation for this contradiction appears in respondents' brief. In any event, the arguments respondents marshal in support of this *per se* claim are unconvincing.

Respondents point out that only women can bear children, and therefore only women can undergo abortion. *Id.* at 24-25. This is true but irrelevant. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification"). A claimant under § 1985(3) must show discriminatory *animus*, not *impact*. *Carpenters v. Scott*, 463 U.S. at 834-35. A campaign to stop production of a medically hazardous intrauterine device does not reflect gender bias just because only women

can use an IUD. A boycott of Nestle products designed to stop that company from marketing baby formula in the Third World is not gender-based just because the alternative to bottle-feeding is breast-feeding. Acts of civil disobedience against a manufacturer of tampons that have been associated with toxic shock syndrome do not constitute instances of sex-discrimination just because only women can use the products. Respondents therefore err by asserting that opposition to abortion is motivated by an animus against women just because only women can become pregnant.

Under respondents' rationale, this Court would need to review every law affecting abortion (or for that matter, pregnancy or childbirth) under the standards applicable to sex discrimination. This Court has never so held.

It is true that Congress has specifically chosen, by statutory amendment, to treat *pregnancy* discrimination as a surrogate for sex discrimination *in the context of employment*. *See International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1203 (1991). Congress, however, has not passed any similar amendment to either § 1985(3) or the Constitution itself.

Respondents would interpret the decision of this Court in *Johnson Controls* to have overruled, *sub silentio*, the prior decisions of this Court (*Geduldig v. Aiello*, 417 U.S. at 496 n.20, and *General Electric Co. v. Gilbert*, 429 U.S. 125, 134-35 (1976)) which recognized that discrimination tied to pregnancy is not the same as sex discrimination. *See* Brief for Respondents at 25-26. But *Johnson Controls* did no such thing. Rather, *Johnson Controls* merely held that a policy which *by its terms* excludes "women" with childbearing capacity from certain jobs "explicitly discriminates against women." 111 S. Ct. at 1202. This is no more than the statement of a tautology. Indeed, the *Johnson Controls* Court went on to clarify that the policy at issue was not "facially neutral," with only a "discriminatory *effect*" upon women, *id.* at

1203 (emphasis added), because the policy classified *in so many words* "on the basis of *gender* and childbearing capacity, rather than fertility alone," *id.* (emphasis added). The reference to "gender and" childbearing capacity would have been meaningless had "childbearing capacity" itself sufficed as a sex-based term.

In the present case, of course, respondents have established *no* facial discrimination, nor even an *impact* on childbearing capacity, much less on pregnancy. Respondents' claim is that a mere *impact* on *abortion* is automatically a form of sex discrimination. Neither *Johnson Controls* nor any other decision of this Court can be stretched far enough to sustain such a proposition.

Respondents contend that abortion is a "constitutionally protected right of women as a class." Brief for Respondents at 28. This propostion is highly questionable. The status of *Roe v. Wade*, 410 U.S. 113 (1973), is very uncertain in light of *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). *Roe*, moreover, located an abortion liberty within a right of *individual privacy*, *see* 410 U.S. at 153, not within respondents' novel concept of a "constitutional right of a class." But in any event, the constitutional status of abortion—whatever it may be—is simply irrelevant to the question of the *animus* of petitioners. There is absolutely no reason to believe that petitioners consider abortion essential to female equality, or that petitioners wish to forestall that equality. There is likewise no reason to believe that considerations of this sort underlay petitioners' opposition to abortion.[8] On the contrary, petitioners view abortion in straightforward fashion as the unjust killing of innocent children. *E.g.*, 726 F. Supp. at 1488 (Pet. App.

[8] It is perhaps for this reason that respondents resort to speculative psychoanalysis of petitioners' motives. Brief for Respondents at 32-33. Lacking any evidence of a sex-based animus, respondents can do no more than indulge in unfounded suspicions regarding hypothetical secret motives for petitioners' anti-abortion stance.

20a) (affidavit of petitioner Randall Terry) (abortion business is a "child-killing facility").

Respondents may honestly believe that any threat to the practice of human abortion is a threat to female equality.[9] But by no means does § 1985(3) incorporate respondents' tendentious and controversial point of view into federal law.

Petitioners are motivated by an "intense commitment to their *anti-abortion* goals," 726 F. Supp. at 1491 (Pet. App. 26a) (emphasis added), not some secret anti-female bias. The court below improperly assumed a legal equation between opposition to abortion and opposition to women.[10]

B. Respondents Have Not Established the Requisite Violation of a Right Protected Under § 1985(3).

The other fatal defect in respondents' claim under § 1985(3) is respondents' failure to establish that petitioners threatened or violated some independently existing right secured under § 1985(3). "Section 1985(3) provides no substantive rights itself," *Great American*

[9] As indicated in the Brief of Feminists for Life of America, et al., as Amici Curiae, the early feminists of this nation took exactly the opposite view, *see id.* § II. These women, who regarded abortion as, for example, "murder of the innocents," *id.* at 18 (quoting Pauline Wright Davis), would, according to respondents, be guilty of a clear anti-female animus.

[10] It is true, as respondents point out, Brief for Respondents at 28-29, that a discriminatory class animus may motivate conduct that has an impact on those not belonging to the targeted class—for example, white Republican supporters of the newly freed slaves. Thus, the fact that a pro-life rescue prevents everyone—male or female—from entering an abortion business would not alone rebut a charge of anti-female animus *where there was already sufficient evidence of such animus.* But where, as here, there is a complete *absence* of any evidence of anti-female animus, the fact that pro-life rescuers block all comers serves only to confirm the uncontested fact that the true "animus" of petitioners is opposition to the practice of abortion, not opposition to equality for women.

Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979); hence, the "rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere," *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 833 (1983).

Respondents have relied upon two asserted rights: a right to interstate travel, and a right to abortion. Neither right is implicated here. *See* Brief for Petitioners § I(B).

1. *Respondents have not established a violation of any right to travel.*

Respondents have argued that any obstruction of access to a facility violates a constitutional right to interstate travel if some patrons of the facility come from out of state. Petitioners have already demonstrated the absurdity of this view of the constitutional right to travel. Brief for Petitioners § I(B)(1); *see also* Brief Amici Curiae of Daniel Berrigan, S.J. et al. (providing comprehensive analysis of right to travel).

In their answering brief, respondents have, if anything, adopted an even more extreme position on the scope of the right to travel. Respondents now argue unabashedly that this right encompasses "mere physical movement" and applies even "in the absence of discrimination against an interstate or out-of-state traveler," Brief for Respondents at 41. Respondents also maintain that this unprecedented and unlimited constitutional "right to move" applies in the absence of state action. *Id.* at 36, 37-38. Such a boundless "right" is completely without constitutional warrant.

Respondents also propose, for the first time in this litigation, that blockades of abortion businesses violate a "right to engage in interstate commerce," *id.* at 35. Respondents did not raise or argue this claim in their complaint, *see* Amended Complaint at ¶¶ 38-41 (J.A. 15-16), or in the courts below. Thus, respondents have

waived any such claim. It should be noted, however, that under the expansive commerce precedents of this Court, recognition of a personal "right to engage in interstate commerce" enforceable against purely private interference would mean no less than the total abolition of all distinction between state tort law and federal civil rights laws.

Respondents suggest that this Court should treat the *legal conclusion* of the district court, that petitioners conspired "for the purpose . . . of depriving women seeking abortions . . . of the right to travel," 726 F. Supp. at 1493 (Pet. App. 29a-30a), as a *finding of fact*. Brief for Respondents at 35-36. This argument is misguided. The *fact* is that a pro-life "rescue" seeks to prevent anyone from entering an abortion business. The *legal* question is whether such obstruction infringes a constitutional right to interstate travel. The district court correctly denominated its statement as a "conclusion of law," although that court reached an incorrect legal conclusion.

Respondents repeatedly confuse the constitutional *power* of Congress with the statutory *scope* of § 1985(3). Even if Congress *could* have enacted a general federal tort of obstruction, this would not mean that § 1985(3) is such a law. *See Carpenters v. Scott*, 463 U.S. at 833 ("Neither is respondents' position helped by the assertion that . . . [Congressional] authority to proscribe exclusively private conspiracies . . . *could* be [derived from] the Commerce Clause. That is no doubt the case; but § 1985(3) is not such a provision, since it provides no substantive rights itself . . .") (emphasis added; internal quotation marks and citation omitted). On the contrary, this Court has specifically held that the Congress that enacted § 1985(3) sought to limit the scope of the statue precisely to avoid creating "a federal remedy for 'all tortious, conspiratorial interferences with the rights of others,'" *Scott*, 463 U.S. at 834 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971)). Thus, cases such as *Katzenbach v. McClung*, 379 U.S. 294 (1964),

which address the *power* of Congress to legislate in the area of interstate commerce, are not relevant to the question of the *scope* of § 1985(3).

Respondents specifically rely upon *Griffin v. Breckenridge* for the proposition that plaintiffs under § 1985(3) need only show that " 'they had been engaging in interstate travel or intended to do so,' " Brief for Respondents at 42 (quoting *Griffin*, 403 U.S. at 106). But respondents take the quoted language totally out of context. In the full context of the opinion, the quoted language relates to the constitutional *authority* of Congress, not the scope of either § 1985(3) or the right to travel. The *Griffin* Court had already concluded, earlier in its opinion, that the plaintiffs had "state[d] a cause of action under § 1985(3)," 403 U.S. at 103. The language quoted above related only to the *separate question* "whether Congress had constitutional power" to impose liability under the circumstances of the case. *Id.* The Court concluded, not that the complainants personally possessed a constitutional right to interstate travel that was enforceable against purely private parties, but that it "is within the *power* of Congress to protect" a right to travel in this context, *id.* at 106 (emphasis added). The language respondents quote sufficed only to show "that the [plaintiffs] had suffered from conduct that *Congress may reach under its power* to protect the right of interstate travel," *id.* (emphasis added). *Griffin* did *not* hold that any private tortious interference with anyone who happened to be engaged in interstate travel would represent a federal constitutional violation. Indeed, such a reading of *Griffin* is completely incompatible with the Court's painstaking efforts to construe § 1985(3) to *avoid* converting it into a general federal tort law. *See* 403 U.S. at 101-02.[11]

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[11] Such a reading of *Griffin* would also be at odds with the decisions of this Court regarding the scope of the right to interstate travel. This right protects against *discrimination on the basis of residency, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972) (new resi-

2. *Respondents have not established a violation of any right to abortion.*

Respondents have conceded the absence of state action, and thus cannot establish a violation of any abortion right as a predicate for their § 1985(3) claim. Brief for Petitioners § I(B)(2).[12]

Respondents propose, for the first time, that an abortion claim might suffice under a *different* clause of § 1985(3), the "preventing or hindering" clause. *See* Brief for Respondents at 43-44. But respondents did not bring suit under this part of § 1985(3), *see* Amended Complaint ¶¶ 38-41 (J.A. 15-16) (alleging causes of action only under the first clause of § 1985(3)), and respondents did not argue any such claim in either of the courts below. Respondents have therefore waived this argument. *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331, 1336 n.3 (1990) (refusing to affirm judgment below on the basis of an alternative argument "not presented to either court below, nor . . . supported by arguments in the record"). Furthermore, there is no reason to believe that the "equal protection" language of this second

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dents denied right to vote for one year), or actions taken with the "*primary objective*" of deterring interstate migration, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality) (emphasis added). The right to travel does *not* create a federal tort of obstruction, either for the general populace or as a special privilege of interstate travelers. *See* Brief for Petitioners § I(B)(1); Brief Amici Curiae of Daniel Berrigan, S.J. et al. (reviewing cases).

[12] Respondents attempt to postpone the demise of this claim by arguing that the issue is not before this Court. Brief for Respondents at 42-43. But this Court has granted review of the question whether respondents' claim under § 1985(3) is so insubstantial as to deprive the federal courts of subject matter jurisdiction (Question #4). Resolution of this question requires an assessment of the substantiality of respondents' abortion claim. The frivolousness of this claim—a claim already rejected by every court to address the issue, *see* Brief for Petitioners at 32-33—is therefore properly before this Court.

clause, *see* § 1985(3), would not entail the same statutory requirements of animus and independent rights which respondents have failed to satisfy under the first clause of the statute.

Respondents lamely argue that state action is not really a requirement under § 1985(3) even when the right asserted is only valid against state action. Brief for Respondents at 44. *Scott*, however, rejected that argument. 463 U.S. at 823-33.[13] Respondents suggest indirectly that *Scott* be overruled on this point, *id.* (citing the dissent in *Scott*), but provide no rationale for this precipitous course.

Finally, respondents half-heartedly assert that there is indeed a constitutional right to abortion that is effective against purely private action. Brief for Respondents at 45. This Court should decline respondents' invitation to initiate such a jurisprudential revolution.

II. RESPONDENTS' CLAIM UNDER 42 U.S.C. § 1985(3) IS TOO INSUBSTANTIAL TO SUPPORT FEDERAL SUBJECT MATTER JURISDICTION.

Respondents' claim under 42 U.S.C. § 1985(3) is "so attenuated and unsubstantial as to be absolutely devoid of merit" and is therefore insufficient to support federal subject matter jurisdiction, *see Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (internal quotation marks and citation omitted). Petitioners have already elaborated upon this argument, Brief for Petitioners § II, and respondents have not provided any serious response.

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[13] Respondents' attempt to distinguish *Scott* by conjuring up a distinction between "state action" and "state involvement" is unavailing. Respondents cite no authority for such a proposition. Moreover, the present case involved an alleged conspiracy that was entirely private, and *Scott* explicitly rejected the applicability of § 1985(3) when "wholly private" conspiracies were alleged to deny a right protected only against state action, 463 U.S. at 833.

Respondents argue that their claim cannot be insubstantial because it has been "explicitly endorsed by two courts of appeals and seven district courts." Brief for Respondents at 45-46. In reality, the use of § 1985(3) against anti-abortion rescue activities has only been "explicitly endorsed" by *one* court of appeals other than the court below—namely, the Second Circuit, in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). The "other" federal appeals court to sustain such a claim was the Fourth Circuit in the very decision now on review before this Court. In its ruling on the applicability of § 1985(3), moreover, the court below simply followed *New York State NOW* without any independent analysis. *See* 914 F.2d at 585 (Pet. App. 8a).

In any event, respondents' argument amounts to a claim that this Court is bound, on the issue of subject matter jurisdiction, by the rulings of *lower* federal courts —even when they are divided, *see* Pet. for Cert. § I (noting the conflict among the federal courts of appeals and district courts). This is obviously an inversion of the true order of the judicial system.

III. THE AWARD OF COSTS AND ATTORNEYS FEES MUST BE VACATED.

The award of costs and attorneys fees to respondents must fall with the reversal of the judgment below. *See* Brief for Petitioners § III.

Respondents do not provide any new argument on this issue, and therefore no further discussion is necessary. It bears mention, however, that the award of attorneys fees to respondents cannot stand because of the meritlessness of respondents' *federal* claims. Once this Court rejects respondents' claims under § 1985(3), the award of fees must be overturned, even if this Court were to hold that these federal claims, though unmeritorious, were nevertheless sufficiently substantial to support pendent

jurisdiction.[14] Brief for Petitioners at 36-37 (citing cases).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the opening Brief for Petitioners, this Court should reverse the judgment of the court of appeals and vacate the award of costs and attorneys fees to respondents.

Respectfully submitted,

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[14] Were the Court to reach such a conclusion, the proper course would be to reverse the award of fees and costs, vacate the judgment below, and remand for consideration of the propriety of exercising pendent jurisdiction in the absence of any valid federal claim. (The court below had declined to disturb the exercise of pendent jurisdiction "[i]n light of our disposition of the federal question," 914 F.2d at 586 (Pet. App. 9a); thus, the court of appeals should be given the opportunity, on remand, to reconsider this issue, should this Court hold that the respondents' federal claims, though meritless, were not jurisdictionally insubstantial.)

(8)

No. 90-985

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In the Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, ET AL., PETITIONERS

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a conspiracy to deter pregnant women from obtaining abortions involves the kind of class-based animus required by 42 U.S.C. 1985(3).

2. Whether obstructing access to a medical facility deprives out-of-state patients of their constitutional right of interstate travel.

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INTEREST OF THE UNITED STATES

Various acts of Congress exclude abortion services from the ambit of federal medical assistance programs. See, *e.g.*, 20 U.S.C. 1688; 42 U.S.C. 300a-6 (Title X family planning programs); 42 U.S.C. 300z (Adolescent Family Life Act); Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (Hyde Amendment). A decision by this Court that opposition to abortion is a form of gender-based discrimination could bring those laws into question, on the ground that they violate equal protection principles underlying the Due Process Clause by discriminating against women. The United States also participated as amicus curiae in two earlier cases involving the scope of 42 U.S.C. 1985(3), *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979), and was a party in *United States* v. *Guest*, 383 U.S. 745 (1966),

which involved a closely related federal criminal statute, 18 U.S.C. 241.[1]

STATEMENT

1. Petitioner Operation Rescue is an unincorporated association with the principal goals of preventing abortions and ending the legalization of abortion. Operation Rescue seeks to achieve these goals by, among other means, conducting "rescue" demonstrations at abortion clinics. Petitioners also include six individuals who oppose abortion and its legalization, and who participate in demonstrations organized and planned by Operation Rescue. Respondents are nine abortion clinics located in the greater Washington, D.C., metropolitan area [2] and five organizations that seek to establish and preserve access to abortion. Pet. App. 16a, 18a-20a.

During "rescue" demonstrations, petitioners obstruct the entrances to and exits from an abortion clinic, thereby effectively closing the clinic temporarily, preventing abortions from being performed for that period, and "rescuing" the fetuses that would otherwise have been aborted. Pet. App. 18a. The purpose of these demonstrations, as described in Operation Rescue's literature, is to "intervene between abortionists and the innocent victims," by "*physically* blockading abortion mills with [human] bodies." *Id.* at 20a (quoting *Operation Rescue, National Day of Rescue—October 29, 1988* (1988)). During

[1] The United States, in addition, has participated in the defense of actions brought against federal officers and employees under 42 U.S.C. 1985(3). *E.g., Martinez* v. *Winner*, 771 F.2d 424 (10th Cir. 1985) (federal prosecutors); *Jafree* v. *Barber*, 689 F.2d 640 (7th Cir. 1982) (FBI agents); *Gillespie* v. *Civiletti*, 629 F.2d 637 (9th Cir. 1980) (U.S. marshals).

[2] The Washington metropolitan area encompasses the District of Columbia; Prince Georges and Montgomery Counties in Maryland; and Arlington County, Fairfax County, the City of Fairfax, the City of Falls Church, Loudon and Prince William Counties, and the City of Alexandria in Virginia. Pet. App. 17a n.2.

such a demonstration, no person—male or female—is allowed by the demonstrators to enter the clinic.[3]

2. Respondents brought this action in the United States District Court for the Eastern District of Virginia, seeking, among other things, to enjoin petitioners from impeding access to certain medical facilities. In their complaint, respondents asserted that petitioners had violated 42 U.S.C. 1985(3) by conspiring to interfere with respondents' rights to travel interstate and to obtain abortions. Respondents included in their complaint pendent state law claims for trespass, public nuisance, and tortious interference with business relationships. Pet. App. 27a.

Following an expedited hearing, the district court entered a temporary restraining order, barring petitioners from conducting demonstrations at certain medical facilities. Pet. App. 6a. After a trial, the court issued a permanent injunction, barring petitioners from "trespassing on, blockading, impeding, or obstructing access to or egress from the [listed] premises." *Id.* at 11a. The court found that "[s]ubstantial numbers of women seeking the services of clinics in the Washington Metropolitan area travel interstate to reach the clinics," *id.* at 22a, and held that petitioners had violated 42 U.S.C. 1985(3) by conspiring "for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counselling services, of the right to travel," Pet. App. 29a-30a.[4]

[3] [W]hile the child-killing facility is blockaded, no one is permitted to enter past the rescuers, *neither women nor men.* Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress.

J.A. 25 (Affidavit of Randall Terry) (emphasis added). The above quotation also is included in the district court's opinion, except that the district court's opinion omits the phrase "neither men nor women." See Pet. App. 20a.

[4] The dates for the demonstrations that petitioners had planned for November 1989 had passed by the time that the district court

In reaching that conclusion, the district court acknowledged that, under this Court's decisions in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. 825 (1983) (*Carpenters* v. *Scott*), a plaintiff must prove the following four elements in order to establish a violation of Section 1985(3): (1) the defendant engaged in a conspiracy; (2) the defendant did so for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; (3) a co-conspirator took some act in furtherance of the conspiracy; and (4) a person was thereby injured in his person or property, or was deprived of a right or privilege enjoyed by a citizen of the United States. Pet. App. 27a-28a, citing *Griffin* v. *Breckenridge*, 403 U.S. at 102-103, and *Carpenters* v. *Scott*, 463 U.S. at 828-829. The court concluded that respondents had easily satisfied the first, third, and fourth elements of the *Griffin* test. Pet. App. 28a-31a. With regard to the second element, the court held that "gender-based animus satisfies the 'purpose' element of Section 1985(3)," and that "a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under Section 1985(3)" because respondents' "members and patients constitute a subset of a gender-based class." Pet. App. 28a-29a. The court did not decide whether petitioners also had violated Section 1985(3) by obstructing respondents' right to obtain an abortion, noting that respondents' claim in this regard was "problematic" because of the "likely absence of state action on these facts," Pet. App. 31a-32a. See also *id.* at 31a-33a. The court also held that respondents were entitled to relief under their state law trespass and public nuisance theo-

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issued the permanent injunction. Nonetheless, relying on the "capable of repetition, yet evading review" doctrine, the district court ruled that the case was not moot. Pet. App. 25a-26a.

ries, but not on their claim for tortious interference with business relationships. *Id.* at 33a-36a.[5]

3. Petitioners appealed, and the court of appeals affirmed in a per curiam opinion. Pet. App. 1a-9a.[6] The court stated that the district court's "holding that gender-based animus satisfie[d] the 'purpose' element of § 1985(3) has been forecast by" earlier Fourth Circuit case law. *Id.* at 8a. Moreover, agreeing with the Second Circuit, the court held that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." Pet. App. 8a, citing *New York State NOW* v. *Terry*, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990). The court did not decide whether Section 1985(3) encompasses violations of a right to privacy. Pet. App. 9a.[7]

SUMMARY OF ARGUMENT

I. In *Griffin* v. *Breckinridge*, 403 U.S. at 102, this Court concluded that Section 1985(3) requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." No such invidiously discriminatory purpose is present here. Petitioners do not aim their anti-abortion demonstrations exclusively at women; nor do petitioners harbor a gender-based animus. Petitioners target their actions at anyone

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[5] The permanent injunction was originally set to terminate on July 31, 1990, but the district court subsequently extended the order on two occasions. Pet. App. 57a. The order is now scheduled to expire on September 24, 1991. By its own terms, however, the injunction may be extended for good cause shown. *Id.* at 60a.

[6] Respondents appealed the district court's denial of broader injunctive relief. The court of appeals upheld the district court's judgment in this respect, Pet. App. 8a-9a, and respondents did not seek review in this Court of that aspect of the judgment below.

[7] The Fourth Circuit also upheld the district court's refusal to dismiss the state law claims and to award respondents attorneys fees and costs. Pet. App. 9a.

—male or female—who is involved in the abortion process. In fact, it is more accurate to say that petitioners' demonstrations are targeted at abortion itself than at persons of any particular gender.

Opposition to abortion is not a form of gender-based discrimination, even though only women can have abortions. Like the Equal Protection Clause, Section 1985(3) does not provide a remedy for conduct that only has a disproportionate effect on women; it requires proof of invidious discrimination. Treating women differently because they seek an abortion is not a form of invidious discrimination on the basis of gender. The Court has held that treating women differently due to pregnancy is not necessarily a form of gender discrimination. *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497 n.20 (1974). That principle applies with greater force in the case of abortion, since "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980).

II. The Court has held that the Constitution protects the right to travel interstate, and that Section 1985(3) provides a damages remedy for a violation of that right by private parties. The Court's cases, however, have not found that the right to travel interstate is violated in the absence of purposeful conduct discriminating against that right. In this case, the district court did not find that petitioners hold demonstrations for the principal purpose of preventing respondents from travelling interstate, nor did the courts below hold that petitioners' actions discriminate against out-of-state residents. Respondents therefore have not proved a violation of their right to travel interstate.

ARGUMENT

I. A CONSPIRACY TO DETER PREGNANT WOMEN FROM HAVING ABORTIONS DOES NOT INVOLVE THE KIND OF CLASS-BASED ANIMUS REQUIRED BY 42 U.S.C. 1985(3)

A. Introduction

Section 1985(3) of Title 42 does not provide a damages remedy for all conspiracies that injure a person in the exercise of legal rights.[8] By its terms, Section 1985(3)

[8] As noted above, the district court relied on Section 1985(3) (along with ancillary state law claims) as a basis for enjoining future demonstrations by petitioners. In entering that injunction, however, the district court did not address the question whether Section 1985(3) authorizes a district court to award injunctive relief, as opposed to damages. In our view, it is doubtful that the district court had the power under Section 1985(3) to enter an injunction against petitioners.

By its terms, Section 1985(3) provides only that a plaintiff "may have an action *for the recovery of damages* * * * against any one or more of the conspirators" (emphasis added). In this regard, Section 1985(3) differs sharply from 42 U.S.C. 1983, which also derives from the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13. See *id.* § 1, 17 Stat. 13 (original version of Section 1983); *id.* § 2, 17 Stat. 13-14 (original version of Section 1985(3)). In contrast to Section 1985(3), Section 1983 authorizes "action[s] at law, *suit*[s] *in equity*, or other proper proceeding[s] *for redress*" (emphasis added). In light of the affirmative provision for damages in Section 1985(3), the absence of any reference to injunctive relief in that law, and the contrast between Sections 1983 and 1985(3) with respect to the type of relief that can be awarded, it is unlikely that Congress authorized the courts to award injunctive relief when in 1871 it adopted what is now Section 1985(3). See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 847 (1991); *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2534 (1990). Moreover, this Court has made clear that Section 1985(3) provides no substantive rights itself, and is only

applies only to those conspiracies whose "purpose [is to] depriv[e] * * * any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." Two decades ago, in *Griffin* v. *Breckenridge*, this Court interpreted that clause to mean that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102 & n.10. *Griffin*

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remedial. *Carpenters* v. *Scott*, 463 U.S. at 833; *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 372 (1979). This situation is therefore quite unlike the one that this Court addressed in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). There, this Court addressed the question whether a remedy could be fashioned when a statute, 42 U.S.C. 1982, conferred substantive rights without also authorizing a specific remedy. By contrast, here the substantive right must be found elsewhere; the only purpose of the statute is to provide a remedy; and that remedy by its terms is limited to damages. Nonetheless, some courts have held that injunctive relief is available under Section 1985(3). See *Mizell* v. *North Broward Hosp. Dist.*, 427 F.2d 468, 473 (5th Cir. 1970); *Action* v. *Gannon*, 450 F.2d 1227, 1237-1238 (8th Cir. 1971) (en banc). Neither case, however, is persuasive. *Mizell* relied on a dictum in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 (1968), and on *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. at 238-240, which is inapposite, as explained above. *Action* simply relied on *Mizell*. Several district courts in cases like this one have entered preliminary injunctions, see, *e.g.*, *NOW* v. *Operation Rescue*, 726 F. Supp. 300, 305 (D.D.C. 1989), or permanent injunctions, see, *e.g.*, *Roe* v. *Operation Rescue*, 710 F. Supp. 577, 589 (E.D. Pa. 1989), without addressing the question whether injunctive relief is available under Section 1985(3).

This case does not require the Court to answer that question. Neither court below addressed it; petitioners did not include it as a Question Presented in their certiorari petition; and it does not go to the jurisdiction of the federal courts to adjudicate this case. Under these circumstances, there is no reason to resolve that question here. See *Air Courier Conf. of America* v. *American Postal Workers' Union*, 111 S. Ct. 913, 917 (1991). Nonetheless, because federal officers have been sued under Section 1985(3), see page 2 note 1, *supra*, we mention this question in order to ensure that this Court does not inadvertently resolve it (or suggest that the Court has resolved it) without the benefit of a complete presentation in an appropriate case.

derived its construction of Section 1985(3) from its text and from the legislative history of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, which revealed that Congress did not intend Section 1985(3) to serve as a general federal tort law. 403 U.S. at 101-102 & n.10. Applying that class-based animus requirement, *Griffin* concluded that allegations of a conspiracy to deprive individuals, because of their race, of equal protection of the law, or of equal privileges and immunities under the law, are actionable under Section 1985(3). 403 U.S. at 103. Since *Griffin*, this Court reaffirmed the principle that Section 1985(3) supplies a remedy only for conspiracies motivated by an invidiously discriminatory animus, stating that this conclusion represents "the authoritative construction of the statute." *Carpenters* v. *Scott*, 463 U.S. at 835. See also *id.* at 849 (Blackmun, J., dissenting). See *Kush* v. *Rutledge*, 460 U.S. 719, 725-726 (1983); *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979).[9]

In this case, the district court took two steps in order to characterize petitioners' motives for its anti-abortion demonstrations as an "invidiously discriminatory animus." First, the court held that Section 1985(3) encompasses not only racial animus but gender-based animus as well. Pet. App. 28a-29a. Second, the court ruled that petitioners' efforts to deter pregnant women from having abortions constitutes gender-based animus for purposes of Section 1985(3). Pet. App. 29a-30a. The court of appeals endorsed both propositions, albeit in a summary fashion. *Id.* at 8a. Most of the other courts that have addressed this question have followed the same analysis.[10]

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[9] The *Griffin* requirement that the defendant act with an invidiously discriminatory animus does not also demand, for example, that the plaintiff be a member of a racial minority. A white civil rights worker could recover damages under Section 1985(3) if he was the victim of an assault motivated by bias against blacks.

[10] See, *e.g.*, *New York State NOW* v. *Terry*, 886 F.2d at 1358-1359; *Southwestern Medical Clinics of Nevada, Inc.* v. *Operation Rescue*, 744 F. Supp. 230 (D. Rev. 1989); *Cousins* v. *Terry*, 721

This Court has never decided whether Section 1985(3) reaches gender-based animus.[11] *Griffin* expressly declined

F. Supp. 426, 430 (N.D.N.Y. 1989); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. 165, 169 (D. Or. 1988); *Roe* v. *Operation Rescue*, 710 F. Supp. at 581; *New York State NOW* v. *Terry*, 704 F. Supp. 1247, 1259 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990). Contra *Mississippi Women's Medical Clinic* v. *McMillan*, 866 F.2d 788 (5th Cir. 1989); *National Abortion Fed'n* v. *Operation Rescue*, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989). Cf. *Roe* v. *Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), cert. denied, 484 U.S. 848 (1987).

The courts below did not decide whether Section 1985(3) reaches violations of a right to privacy. Pet. App. 9a, 31a-33a. That question is materially different from the one that those courts discussed in this case. This Court held in *Carpenters* v. *Scott*, 463 U.S. at 831-834, that a plaintiff must prove that a conspiracy involved state action when the conspiracy is directed against a right (there, the First Amendment) that by definition is protected only against state action. "[T]he right to an abortion" discerned in *Roe* v. *Wade* would also fit into that category since it was "derived from the Due Process Clause," *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040, 3058 (1989) (plurality opinion), citing *Roe* v. *Wade*, 410 U.S. 113, 164 (1973); see also *Harris* v. *McRae*, 448 U.S. 297, 312 (1980), which protects individuals only against state action, *Carpenters* v. *Scott*, 463 U.S. at 831-832.

The lower courts are divided on that question. The district court in *New York State NOW* v. *Terry*, 704 F. Supp. at 1260, held that Section 1985(3) encompassed a conspiracy to deny women the right to have an abortion. An Eighth Circuit panel came to the same conclusion, *Lewis* v. *Pearson Foundation, Inc.*, 908 F.2d 318, 322, but that opinion was vacated when rehearing en banc was granted, and the en banc court, by an equally divided vote, affirmed the district court's judgment dismissing the plaintiff's complaint, 917 F.2d 1077 (1990). Most district courts have held that Section 1985(3) does not reach a right to abortion, or have not resolved the issue. *E.g.*, *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. at 168; *Roe* v. *Operation Rescue*, 710 F. Supp. at 583. The Court need not resolve that issue in this case, however, because the lower courts did not do so.

[11] The Members of this Court have divided over this question. Compare *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. at 385 & n.7 (Stevens, J., concurring) (Congress did not envision that Section 1985(3) would reach claims of gender-based

to decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under Section 1985(3). 403 U.S. at 102 n.9. The Court again left that question open in *Carpenters* v. *Scott*, which held that Section 1985(3) does not protect workers who refuse to join a union. The Court wrote that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." 463 U.S. at 836.

On the one hand, nothing in the text of Section 1985(3) indicates an affirmative intention to reach conspiracies based on gender, and it would be fanciful to ascribe such an intent to the 1871 Congress. The immediate object that Congress had in mind for this law was "to combat the prevalent animus [in the South] against Negroes and their supporters." *Carpenters* v. *Scott*, 463 U.S. at 836. Beginning in 1866, the Ku Klux Klan conducted a campaign of assault, terror, and murder against the newly freed slaves and their sympathizers, and became virtually a shadow government in the formerly rebellious States because of the inability or unwillingness of state officials to control the widespread violence. "The Klan's goal was to overthrow Republican Reconstruction policies both by terrorizing local supporters of those policies in

animus), with *id.* at 389 n.6 (White, J., dissenting) (Section 1985(3) reaches gender-based discrimination) and *Carpenters* v. *Scott*, 463 U.S. at 853 (Blackmun, J., dissenting) (expressing the view that gender-based animus was a "class trait[]" that met the animus requirement). Several circuit and district courts have held that Section 1985(3) reaches gender-based animus. *New York State NOW* v. *Terry*, 886 F.2d at 1358-1359; *Volk* v. *Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Life Ins. Co. of N. Am.* v. *Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978) (en banc), rev'd on other grounds, 442 U.S. 366 (1979); *Conroy* v. *Conroy*, 575 F.2d 175, 177 (8th Cir. 1978); pp. 9-10 note 10, *supra* (collecting district court decisions). See *Long* v. *Laramie County Community College Dist.*, 840 F.2d 743, 750-752 (10th Cir.) (implicitly assuming that Section 1985(3) reaches gender-based animus), cert. denied, 488 U.S. 825 (1988).

order to place sympathetic Democrats in office, and when that failed by supplanting the authority of local officials with mob violence." *Id.* at 850 n.15 (Blackmun, J., dissenting).[12] For these reasons, the Court has expressed doubt that Section 1985(3) "went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Carpenters* v. *Scott*, 463 U.S. at 837. On the other hand, the breadth of the terms used in the statute—"[a] purpose of depriving * * * any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"—could be read to encompass gender-based animus.[13]

Here, as in *Griffin* and *Carpenters* v. *Scott*, there is no need to answer that question in order to resolve this case, because the judgment below must be reversed for other reasons. Even if Section 1985(3) is broad enough to reach gender-based animus, the actions taken by petitioners are not a form of gender-based discrimination. See pp. 13-20, *infra*. Moreover, describing the class here

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[12] See also, *e.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325, 337-340 (1983); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 610-611 n.25 (1979); *District of Columbia* v. *Carter*, 409 U.S. 418, 425-429 (1973); *Griffin* v. *Breckenridge*, 403 U.S. at 99-102.

[13] The Court has said that "there is some legislative history to support the view that § 1985(3) has a broader reach" than racially based animus alone. *Carpenters* v. *Scott*, 463 U.S. at 836. In this regard, the Court has pointed to a floor statement of Senator Edmunds, the manager of the bill on the Senate floor, that "if a conspiracy were formed against a man 'because he was a Democrat, * * * or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it.'" *Id.* at 836-837, quoting Cong. Globe, 42d Cong., 1st Sess. 567 (1871). At the same time, the Court has noted that "[t]he provision that is now § 1985(3), however, originated in the House. The narrowing amendment, which changed § 1985(3) to its present form, was proposed, debated, and adopted there, and the Senate made only technical changes to the bill." *Carpenters* v. *Scott*, 463 U.S. at 837.

as the class of "women seeking abortions" does not further the analysis under Section 1985(3). See pp. 20-23, *infra*. The courts below therefore erred in concluding that respondents stated a claim against petitioners that could be redressed under Section 1985(3).

B. Opposition To Abortion Is Not An Invidious Class-Based Discrimination Against Women Under Section 1985(3)

1. Operation Rescue and its members do not aim their anti-abortion activities exclusively at women. Rather, as the district court found, petitioners direct their actions at anyone, whether male or female, who assists or is involved in the abortion process—doctors, nurses, counsellors, boyfriends, husbands and family members, staff, and others. Pp. 3-4, *supra*. Indeed, it is more accurate to say that petitioners' activities are targeted at the abortion *process* itself, rather than at persons of any particular gender. Petitioners' goal, the district court noted, is to 'intervene between abortionists and the innocent victims." Pet. App. 20a (quoting *Operation Rescue, National Day of Rescue—October 29, 1988* (1988)). The fact that Operation Rescue's demonstrations are directed toward and operate against both men and women is a strong indication that its actions do not constitute the type of "discrimination" at which Section 1985(3) was aimed.

The Fifth Circuit's decision in *Mississippi Women's Medical Clinic* v. *McMillan*, 866 F.2d 788 (1989), is instructive in this respect. There, abortion protestors picketed a medical clinic that performed abortions, and the clinic sought to enjoin the picketing under Section 1985(3). The court concluded that the clinic was not entitled to an injunction, because the clinic did not show that the protestors acted with "an invidious discriminatory *animus*." 866 F.2d at 794. As the court explained, "the record indicates that the protestors do not target their pro-life advocacy at any particular group. The protestors (who are made up of both men and women) confront and try to persuade to their point of

view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc." *Ibid.* "In fact," the Fifth Circuit pointed out, "the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions." *Ibid.* For these reasons, the Fifth Circuit concluded that the clinic had failed to show that the abortion protestors were motivated by a class-based animus, as required by *Griffin* and *Carpenters* v. *Scott*.

That is likewise the case here, in light of the district court's factual findings. "The purpose of these 'rescue' demonstrations," the district court found, "is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely." Pet. App. 20a. "By disrupting and blockading family planning and abortion clinics," the district court also found, "[petitioners] and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services, and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views." *Ibid.* Those factual findings, which were not disturbed by the court of appeals, reveal that the demonstrations conducted by Operation Rescue have as their motive an opposition to abortion and thus are conducted for a purpose other than animosity toward women.

Petitioners' opposition to abortion also cannot be characterized as gender-based discrimination because that opposition does not implicate all women. Rather, as the district court recognized, petitioners' opposition to abortion implicates only a "subset" of women: those women who seek an abortion or abortion counselling. Pet. App. 29a. That "subset" is in fact a minority of the class of all women, since the district court did not find that most women seek an abortion or abortion counselling. What is more, it is a matter of common knowledge that a considerable number of women share petitioners' moral objections to abortion, and petitioners' demonstrations certainly cannot be viewed as discriminating against those women. For these reasons, the actions petitioners take to prevent clinics from performing abortions are not motivated by a bias against women and do not invidiously discriminate against women *as a class* within the meaning of Section 1985(3). As one court has put it: "[I]f the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender." *National Abortion Fed'n* v. *Operation Rescue*, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989). Just as there is no gender-specific position concerning other moral questions, so, too, there is no specifically "male" or "female" point of view with respect to abortion.

2. Respondents contend it is irrelevant that petitioners' demonstrations adversely affect only women who seek abortions or abortion counselling, instead of substantially all women. Analogizing petitioner's actions to a hypothetical conspiracy involving racial discrimination, respondents note that obstructing access to the polls could not be defended on the ground that it was directed at only those blacks who seek to exercise their right to vote. Br. in Opp. 10. See *New York State NOW* v. *Terry*, 886 F.2d at 1359-1360. That analogy is erroneous, however, for several reasons.

As explained above, petitioners' demonstrations are not directed exclusively at the women who seek an abortion or abortion counselling; these demonstrations are targeted at everyone—male or female—involved in the abortion process. Respondents also overlook that a substantial number of women oppose abortion. That fact distinguishes this case from *Griffin* v. *Breckenridge*, in which there was no suggestion that a substantial number of blacks opposed granting blacks the right to vote. In other words, petitioners' anti-abortion demonstrations are not a form of gender-based discrimination because they are aimed at a *practice*, not at a type of *person*.

3. The Second Circuit in *New York State NOW* v. *Terry*, 886 F.2d at 1359-1360, and most district courts

that have addressed this question appear to have believed that opposition to abortion is necessarily a form of gender-based discrimination because only women can have abortions. That conclusion, however, rests on a mistaken assumption—that actions with a disproportionate effect on women inevitably discriminate invidiously on the basis of gender. What is true for purposes of the Equal Protection Clause is also true in the case of Section 1985(3): What transforms action having a disproportionate effect on women from the byproduct of otherwise legitimate conduct into invidious discrimination against women per se is the *intent* to disadvantage women as a class of individuals. See *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-268 (1977); *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 278-279 (1979). Section 1985(3) does not require a "specific" or "willful" intent to harm class members, as this Court noted in *Griffin*, 403 U.S. at 102 n.10. At the same time, Section 1985(3) is violated only when an individual acts, with or without "scienter," 403 U.S. at 102 n.10, for the purpose of injuring a member of a protected class. The "discriminatory purpose" relevant for the Equal Protection Clause and Section 1985(3) "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r* v. *Feeney*, 442 U.S. at 279 (citation and footnote omitted). That is what *Griffin* meant by its requirement that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102 & n.10.

Two cases in which this Court has addressed whether pregnancy-based discrimination constitutes gender-based discrimination supply a useful illustration of this point. For example, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court rejected the contention that a state disability

insurance program violated the Fourteenth Amendment Equal Protection Clause by excluding from coverage pregnancy-related disabilities, even though only women can become pregnant. The Court found that the program was "a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such." *Geduldig* v. *Aiello*, 417 U.S. at 496-497 n.20. This Court reasoned as follows, *ibid.*:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Two years later, in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the Court relied on *Geduldig*'s reasoning in the course of rejecting a challenge based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to a comparable private disability plan. The Court in

Gilbert interpreted *Geduldig* as having held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not gender-based discrimination at all." 429 U.S. at 136. See also *id.* at 134-135.

Although *Geduldig* did not involve Section 1985(3), the Court's reasoning in that case is applicable here. In fact, this Court's analysis in *Geduldig* applies even more forcefully in the abortion context. Here, as in *Geduldig*, there are two relevant categories—persons involved in the abortion process, and everyone else—and neither class is exclusively female; each category includes both women and men. The analysis in *Geduldig* therefore strongly shows that petitioners' demonstrations are attributable to a factor other than gender-based animus, and, perhaps not surprisingly, as discussed above the district court's factual findings confirm that hypothesis. In sum, just as the insurance programs in *Geduldig* did not discriminate on the basis of gender even though only women can become pregnant, petitioners' opposition to abortion is not gender-based even though only women can have abortions.[14]

To be sure, Congress overruled *General Electric Co.* v. *Gilbert*, *supra*, by adopting the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076,

[14] A different question would be presented if respondents proved that petitioners directed their anti-abortion efforts specifically and exclusively at women because petitioners held an invidiously discriminatory animus against women as a class. Were that true, the demonstrations put on by petitioners would be simply a pretext for discriminating against women, and *Geduldig* v. *Aiello*, 417 U.S. at 496-497 n.20, indicates that such conduct would amount to gender discrimination. Accord *General Electric Co.* v. *Gilbert*, 429 U.S. at 135-136. But respondents made no such allegation in this case; the district court made no such finding; and none of the findings that the district court did make would support a claim of pretext. In fact, the district court expressly found that petitioners were sincerely committed to protecting the fetus and did not find that petitioners harbored any animosity toward women as such. In the district court's words: "It is indisputable that all [petitioners] share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." Pet. App. 20a. Given that finding, no claim of pretext can be made in this case.

which prohibits employment discrimination on the basis of pregnancy. 42 U.S.C. 2000e(k) (defining discrimination "because of sex" and "on the basis of sex" *under Title VII* to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions"). See *International Union, United Automobile, Aerospace & Agric. Implement Workers of America* v. *Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983). Congress has therefore drawn a line for purposes of Title VII that differs from the one that this Court drew for equal protection purposes in *Geduldig*. For several reasons, however, the rationale of *Geduldig* is still applicable in this context.

First, the Pregnancy Discrimination Act of 1978 by its express terms did not modify Section 1985(3), which this Court has understood to be aimed at the same kind of invidious discrimination at which the Equal Protection Clause is directed. See *Griffin* v. *Breckenridge*, 403 U.S. at 102; *Carpenters* v. *Scott*, 463 U.S. at 829. Accordingly, the decision in *Geduldig*, 417 U.S. at 496-497 n.20, is still directly relevant. Moreover, regardless of how the Equal Protection Clause should be applied in other settings, this case involves abortion, which is critical to any proper analysis. Even if the Pregnancy Discrimination Act tells us that pregnancy-based decisions that adversely affect women are discriminatory per se, there certainly can be no doubt that opposition to abortion is not, without more, gender-based discrimination. The reason is that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980). The Pregnancy Discrimination Act itself recognizes that point, because it does not generally compel employers to subsidize abortions for their female employees. 42 U.S.C. 2000e(k) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus

were carried to term, or except where medical complications have arisen from an abortion * * *.").

There are more interests at stake in the abortion decision than those of the pregnant woman. The government has a legitimate interest in protecting both the unborn child and the health of the mother, *Harris* v. *McRae*, 448 U.S. at 324-325; *Roe* v. *Wade*, 410 U.S. 113, 162, 164-165 (1973); the parents of a pregnant minor have a valid interest in participating in their daughter's decision whether to carry her pregnancy to term, *Hodgson* v. *Minnesota*, 110 S. Ct. 2926 (1990); and the father of the child has a personal interest in the pregnant woman's decision. Thus, unlike the condition of being pregnant, the "right" to have an abortion is not a fact that is specific to one gender. Instead, it is a legal right as to which the law can properly assign different interests to various parties.

4. Finally, there can be no serious argument that the 42nd Congress, which passed the Ku Klux Klan Act of 1871, would have believed that Section 1985(3) could be used to obtain damages for actions like those challenged here. The abortion of a fetus after "quickening" was a crime at common law, and state laws condemning or limiting abortion were common when that Act was adopted. In 1871, 28 of 37 States and 8 Territories had such laws. *Roe* v. *Wade*, 410 U.S. at 132-136; *id.* at 174-176 & n.1 (Rehnquist, J., dissenting). Under these circumstances, it is safe to say that "the construction of the statute adopted by the Court of Appeals 'would have amazed the legislators who voted for it.'" *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. at 385 n.7 (Stevens, J., concurring) (citation omitted).

C. Defining The Category As "Women Seeking Abortions" Does Not Further The Correct Analysis Under Section 1985(3)

The district court's opinion also could be read as holding that the class of "women seeking abortions" is a protected class under Section 1985(3). Pet. App. 29a

("[Respondents'] members and patients constitute a subset of a gender-based class meeting these requirements [of *Griffin*]."). Other courts have also defined the protected class in that manner.[15] That description of the class of individuals affected by petitioners' anti-abortion demonstrations, however, does not further analysis of the Section 1985(3) question in this case.

If a Section 1985(3) class could be defined by what its members *do* rather than by who its members *are*, as the district court concluded, a plaintiff could always (and easily) allege that he is a member of a class protected by Section 1985(3) merely by claiming that he belongs to a "class of persons who seek to engage in some action that the defendants have combined to resist through tortious means." For example, animal rights advocates could become a class protected by Section 1985(3) by defining themselves as "individuals who seek to prevent animal cruelty." Likewise, female military personnel could bring themselves under the protection of Section 1985(3) merely by defining themselves members of a subclass of "women who seek to participate in combat."

No material difference exists between the hypothetical classes mentioned above and the class recognized by the district court of "women seeking abortions." A class of "women" describes a group with an immutable characteristic, but a class of "women seeking abortions" is defined in part by reference to the actions of its members, those who seek abortions. That definition is an insufficient basis for allowing a person to obtain relief under Section 1985(3). This Court has determined that a class may not be defined simply by reference to the fact that its members are victims of a conspiracy or hold beliefs that differ from ones held by the co-conspirators. *Carpenters* v. *Scott*, 463 U.S. at 834-835. See *Roe v. Abor-*

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[15] See, *e.g.*, *Cousins* v. *Terry*, 721 F. Supp. 426, 430 (N.D.N.Y. 1989); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. at 168; *Roe* v. *Operation Rescue*, 710 F. Supp. at 581. Contra *National Abortion Fed'n* v. *Operation Rescue*, 721 F. Supp. at 1171-1172.

tion Abolition Society, 811 F.2d 931 (5th Cir.), cert. denied, 484 U.S. 848 (1987). The Court wrote in *Carpenters* v. *Scott*, 463 U.S. at 850 (citation omitted), that "the intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class. Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious act." The approach endorsed below, however, allows a plaintiff to circumvent that rule by alleging, not that she is the victim of the defendant's tortious acts, but that she engaged in conduct that (coincidentally) caused her to fall victim to the defendant's tort.

Petitioners' opposition to abortion in this respect resembles the class rejected in *Carpenters* v. *Scott*: workers who refused to join a union. 463 U.S. at 839. That category, like the class of "women seeking abortions" asserted here, was defined by nothing more than a mutual desire to exercise a legal right, rather than an immutable characteristic, such as race. To permit such a "class" to invoke Section 1985(3) clearly would reduce the class-based animus requirement adopted in *Griffin* and reaffirmed in *Carpenters* v. *Scott* to nothing more than a rule of artful pleading, and in the process would make Section 1985(3) a "general federal tort law," contrary to that statute's language, purpose, and history. See *Carpenters* v. *Scott*, 463 U.S. at 834-836; *Griffin* v. *Breckenridge*, 403 U.S. at 102.

In sum, defining the class as "women seeking abortions" does not further the analysis, since petitioners conduct demonstrations for the purpose of stopping clinics from performing abortions, not to injure women because of their gender. Even if women are a class protected by Section 1985(3), defining the relevant class in terms of an activity in which women alone can engage does not prove that petitioners' intent is invidious. The fact remains that abortion is a medical procedure that fits into a category all by itself, and it is for the purpose of bringing that singular procedure to a halt that petitioners hold their demonstrations. That intent does not satisfy the animus requirement of *Griffin* and *Carpenters* v. *Scott*.

II. OBSTRUCTING ACCESS TO A MEDICAL FACILITY DOES NOT WITHOUT MORE DEPRIVE OUT-OF-STATE PATIENTS OF THE CONSTITUTIONAL RIGHT OF INTERSTATE TRAVEL

A. The Right To Travel Interstate Is Not Violated In The Absence Of Proof That The Defendant Has Purposefully Discriminated Against Persons Who Travel Interstate

1. In *Griffin* v. *Breckenridge*, this Court ruled that the right to travel interstate—what the Court there termed "the 'right to pass freely from State to State' "—was protected by the Constitution. 403 U.S. at 106, quoting *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908). According to *Griffin*, this Court's decisions have "firmly established that the right of interstate travel is constitutionally protected," that this right "does not necessarily rest on the Fourteenth Amendment," and that it "is assertable against private as well as governmental interference." 403 U.S. at 105.[16] Finally, *Griffin* also concluded

[16] *Griffin*'s statement that the right to travel interstate "does not necessarily rest on the Fourteenth Amendment," 403 U.S. at 105, understates the uncertainty in this Court's decisions about the source of this constitutional right. Various decisions have located this right in the Privileges and Immunities Clause of Art. IV, § 2, see *Corfield* v. *Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J., Circuit Justice); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 43-49 (1867); *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873); *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908); *Zobel* v. *Williams*, 457 U.S. 55, 78-81 (1982) (O'Connor, J., concurring in the judgment); *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting); the Privileges and Immunities Clause of the Fourteenth Amendment, see *Edwards* v. *California*, 314 U.S. 160, 177, 181-182 (1941) (Douglas and Jackson, JJ., concurring); the Commerce Clause of Art. I, § 8, Cl. 3, see

that the right to travel interstate "is within the power of Congress to protect by appropriate legislation." *Id.* at 106, citing, inter alia, *United States* v. *Guest*, 383 U.S. 745, 759 (1966).

The district court held that petitioners' demonstrations violate the rights of women to cross state lines in order to obtain abortions in the Washington, D.C., area, Pet. App. 30a, and the court of appeals affirmed that holding, *id.* at 8a. Significantly, however, there is no factual finding below that one of petitioners' principal goals is directly to interfere with respondents' right to travel interstate, or that interfering with respondents' right to travel interstate is a conscious part of petitioners' strategy of opposing abortion. Nor did the courts below conclude that petitioners' actions in any way discriminated against out-of-state residents.

By finding a violation of the right to travel interstate in the absence of any of the above elements, the courts below expanded that right beyond anything previously recognized in this Court's decisions. Most of this Court's

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The Passenger Cases, 48 U.S. (7 How.) 283 (1849); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) at 49 (opinion of Clifford, J.); *Edwards* v. *California*, 314 U.S. 160 (1941); the Due Process Clauses of the Fifth and Fourteenth Amendments, see *Kent* v. *Dulles*, 357 U.S. 116, 127 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-506 (1964); *Shapiro* v. *Thompson*, 394 U.S. 618, 671 (1969) (Harlan, J., dissenting); cf. *Califano* v. *Aznavorian*, 439 U.S. 170, 176 (1978); *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981); and the Equal Protection Clause of the Fourteenth Amendment, see *Zobel* v. *Williams*, 457 U.S. at 60 n.6; *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985). See generally *Shapiro* v. *Thompson*, 394 U.S. at 630 n.8; *id.* at 666 (Harlan, J., dissenting); *United States* v. *Guest*, 383 U.S. at 762-770 (opinion of Harlan, J.). See *Attorney General* v. *Soto-Lopez*, 476 U.S. at 902 ("The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration * * * has proved elusive."); *Zobel* v. *Williams*, 457 U.S. at 60 n.6 ("The right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right have remained obscure."). In sum and in truth, to borrow a metaphor from Judge Friendly, the constitutional right to travel is a legal Lohengrin: no one knows from whence it came. Cf. *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

recent interstate travel cases "have dealt with state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents." *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion), citing *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel* v. *Williams*, 457 U.S. 55 (1982); *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Yet as noted above, respondents did not allege that petitioners' activities somehow classify women seeking abortions according to their residence, or result in the unequal distribution of abortions performed in and among the various States represented in the District of Columbia metropolitan area.

In the absence of discrimination against out-of-state residents, this Court has found a violation of the right of interstate travel only when it was proven that a defendant intended to violate that right as one of his principal goals. For example, the Court in *Griffin* v. *Breckenridge*, 403 U.S. at 106 (emphasis added), allowed plaintiffs to take their interstate travel claim to trial because it was open for them to prove at trial that "their federal right to travel interstate was one of the rights *meant* to be discriminatorily impaired by the conspiracy, that the conspirators *intended* to drive out-of-state civil rights workers from the State, or that they *meant* to deter the petitioners from associating with such persons." Similarly, in *United States* v. *Guest*, *supra*, this Court upheld an indictment under 18 U.S.C. 241 [17] that alleged a

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[17] 18 U.S.C. 241 generally tracks Section 1985(3). It provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his

conspiracy to interfere with the right to travel. See 383 U.S. at 757. In so doing, the Court explained, *id.* at 760 (emphasis added):

> [A] conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the *predominant purpose* of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person *because of* his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.

Under 18 U.S.C. 241, as under Section 1985(3), an effect on individuals travelling interstate does not suffice to state a claim based on interference with the right to travel interstate.[18]

It is easy to understand why the Court has been careful to limit the right to interstate travel in the above manner. If that right encompassed *any* activity that had *any* effect on interstate travel, almost every public or private action could be transformed into a violation of the federal constitutional right. For example, a health code inspector and restaurant owner who conspire to close a competitor's restaurant allegedly for health code violations, or two arsonists who conspire to destroy a restaurant, evidently would be trenching on the right to travel interstate, because they would have made it impossible for out-of-state customers to enter a State to do business

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free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

[18] See also *Shapiro* v. *Thompson*, 394 U.S. at 629, 631 ("the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible.").

with the restaurant owner. Airline travelers would have a constitutional cause of action for damages against airline companies each time two companies conspire to hike their fares on interstate flights, since higher fares make it more expensive and, hence, more difficult to travel interstate. Similarly, lifeguards who go on strike in order to close a summer beach resort violate the constitutional rights of every person who would otherwise have traveled across state lines to spend a vacation at the beach. The potential for such claims is limitless. Cf. *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Although *Griffin* acknowledged that the actions of private parties can give rise to a damages action under Section 1985(3), it would be a mistake to equate the actions of private parties with those of the State in all instances. Cf. *United States* v. *Guest*, 383 U.S. at 772 (Harlan, J., concurring in part and dissenting in part) ("There is a difference in power between States and private groups so great that analogies between the two tend to be misleading. If the State obstructs free intercourse of goods, people, or ideas, the bonds of the union are threatened; if a private group effectively stops such communication, there is at most a temporary breakdown of law and order, to be remedied by the exercise of state authority or by appropriate legislation.") That is not to say that a plaintiff must prove he was in fact deterred from travelling interstate, or that temporary deprivations are permissible. On the contrary, "even temporary deprivations of very important benefits and rights can operate to penalize migration." *Attorney General* v. *Soto-Lopez*, 476 U.S. at 907 (plurality opinion), citing *Shapiro*, *Memorial Hospital* v. *Maricopa County*, and *Dunn*, all of which involved residency requirements. The point is that ordinary torts should not be deemed to give rise to a constitutional claim simply because they may have some effect on persons who travel interstate.

2. The cases in which the Court has found a violation of the right to travel in the abortion context are consist-

ent with the limitations that the Court has imposed on that right elsewhere. For example, *Doe* v. *Bolton*, 410 U.S. 179 (1973), held invalid a Georgia law excepting from the State's general criminal abortion law abortions performed on state residents. *Id.* at 184, 200. Because the statute in *Doe* discriminated against out-of-state residents, that case, like *Soto-Lopez*, *Hooper*, *Zobel* and the other cases cited above, involves the unequal distribution of rights based on residency classifications.

In *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), the Court struck down under the First Amendment a Virginia statute prohibiting any person, by the sale or circulation of any publication, to encourage the processing of an abortion. The defendant in *Bigelow* was the managing editor of a weekly newspaper that published, in Virginia, a New York City organization's advertisement that it would arrange low-cost abortions in New York City. In holding that law invalid, this Court stated that it was lawful for Virginia residents to take advantage of the abortion services advertised in petitioner's newspaper because, among other reasons, Virginia could not "prevent its residents from traveling to New York to obtain [abortion] services or * * * prosecute them for going there." 421 U.S. at 824, citing *United States* v. *Guest*, 383 U.S. at 757-759; *Shapiro* v. *Thompson*, 394 U.S. at 629-631; *Doe* v. *Bolton*, 410 U.S. at 200. For a State either to "prevent" its citizens from travelling to another State, or to prosecute them after-the-fact for making such a trip, would directly and purposefully interfere with their right of interstate travel in a manner similar to what transpired in *Griffin* and *Guest*. Indeed, it is particularly noteworthy that *Bigelow* focused on those forms of interference with the right to travel interstate. Theoretically, a State could interfere with a woman's right to travel interstate to obtain an abortion in any number of indirect ways, such as by raising highway taxes, thereby making it more expensive to travel. But this Court steered far clear from recognizing such an

indirect, nonpurposeful violation of the right to travel, perhaps because virtually any State or private action could trigger a damages action were such claims allowed.

B. Petitioners' Demonstrations Did Not Violate Respondents' Right To Travel Interstate

In this case, the district court did not find as a fact that petitioners hold demonstrations *for the principal purpose of* directly preventing respondents from exercising their right to travel interstate, nor did either court below conclude that petitioners' actions discriminated against out-of-state residents. Petitioners' actions, according to the court's below, were tortious under Virginia law, but those actions did not constitute a violation of respondents' right to travel interstate under the federal Constitution. Accordingly, the judgment below should be set aside.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1991

APPENDIX

STATUTE INVOLVED

42 U.S.C. 1985(3), which was originally enacted as Section 2 of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, provides as follows:

> **(3) Depriving persons of rights or privileges**
>
> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

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No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, ET AL.,

Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICI CURIAE OF DANIEL BERRIGAN, S.J., JULI LOESCH WILEY, REV. WILL D. CAMPBELL, ELIZABETH OMILAMI, DENNIS SADLER, MARY QUINN KAMBIC, FR. DONALD J. BAUER, FAYE KUNCE, JOHN CAVANAUGH O'KEEFE, CAROL NAN FELDMAN CROSSED, C. WILLIAM MICHAELS, ESQ., MOLLY RUSH, BERNARD AND ROSE MAE BROUSSARD, LANA AND STEPHEN JACOBS, AND CARTHRYN HOLDERREAD PASSMORE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-985

JAYNE BRAY, ET AL., *Petitioners*,
v.
ALEXANDRIA WOMEN'S HEALTH CLINIC, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICI CURIAE OF DANIEL BERRIGAN, S.J., JULI LOESCH WILEY, REV. WILL D. CAMPBELL, ELIZABETH OMILAMI, DENNIS SADLER, MARY QUINN KAMBIC, FR. DONALD J. BAUER, FAYE KUNCE, JOHN CAVANAUGH O'KEEFE, CAROL NAN FELDMAN CROSSED, C. WILLIAM MICHAELS, ESQ., MOLLY RUSH, BERNARD AND ROSE MAE BROUSSARD, LANA AND STEPHEN JACOBS, AND CARTHRYN HOLDERREAD PASSMORE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI IN THIS CASE*

Amici are individuals who have been or are actively involved in the civil rights, anti-poverty, labor, and peace movements. Some amici have participated in civil disobedience.

*Counsel of record to the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

Amici share a common belief in the importance of nonviolent resistance to injustice. Amici oppose the contention of the Respondents in this case that a nonviolent sit-in is a violation of the federal constitutional right to interstate travel. The notion that civil disobedience itself is a federal constitutional offense is repugnant to the historically valued role of nonviolent protest in this nation and is antithetical to both civil liberty and federalism.

A full list of the individual amici follows:

Daniel Berrigan, S.J.—author; professor of Scripture studies; member, Kairos Community

Juli Loesch Wiley—former organizer, United Farm Workers of America, AFL-CIO

Rev. Will D. Campbell—former head of the Southern Office of the Department of Racial and Cultural Relations of the National Council of Churches

Elizabeth Omilami—organizer for Forsyth County (Georgia) Brotherhood March; member, SCLC

Dennis Sadler—member, Brandywine Peace Alliance; former member, Veterans Against the War

Mary Quinn Kambic—member, Pax Christi, Baltimore; former coordinator, Pittsburgh Draft Resistance; former chair, Pittsburgh Area Students for Peace

Fr. Donald J. Bauer—former member, Congress of Racial Equality; member, Phillip Randolph Institute; labor union activist

Faye Kunce—anti-nuclear activist; member of Amnesty International fast network to protest the death penalty; former director, Seamless Garment Network

John Cavanaugh O'Keefe—peace and civil rights activist; former member, Atlantic Life Community

Carol Nan Feldman Crossed—executive director, Common Ground of Upstate New York; legislative coordinator, New York State 29th District Bread for the World

C. William Michaels, Esq.—producer, New Earth Radio (weekly radio magazine on peace and justice issues); former coordinator, Justice and Peace Office, Archdiocese of Baltimore; coordinator, Pax Christi, Baltimore

Molly Rush—peace organizer; one of the Plowshares Eight

Bernard and Rose Mae Broussard—founders and directors of Starthrowers (peace and justice center) and publishing house on peace and justice issues; active for over 30 years in combating poverty and discrimination throughout the South, especially southern Louisiana

Lana and Stephen Jacobs—founders of the St. Francis Catholic Worker House (shelter for homeless and chronically mentally ill; hospice for AIDS and cancer patients); active for over 20 years in anti-war movement

Cathryn Holderread Passmore—Elder in The Mennonite Church; involved with Mennonite Central Committee; community volunteer counselor; liaison between Oregon State University, Corvallis Police Department, and the community

SUMMARY OF ARGUMENT

The right to interstate travel, historically and as applied without exception by the Court, has two purposes: (i) to prohibit actual barriers to travel across state lines and (ii) to prohibit discrimination against nonresidents. This brief's comprehensive survey of the Court's right to interstate travel cases establishes those two purposes, neither of which applies in this case. Petitioners' proposed nonviolent protest activities did not interfere with travel across state lines in any way and would not have discriminated between residents and nonresidents. Respondents' and the lower courts' rationale effectively creates a new federal tort of obstruction available only to nonresidents and available only because of the fortuity of their residence out-

of-state, not because they are discriminated against in relation to residents.

(The survey of the Court's right to interstate travel cases also reveals a need for the Court to decide finally what constitutional provision is the source of the right, and points to the privileges and immunities clause of article IV as the proper provision. In addition, though Petitioners are entitled to prevail on Respondents' claims for the reasons discussed in the paragraph above even if the Court does not so hold, the right to interstate travel is properly applied only against state action.)

Finally, because the Court's previous right to interstate travel cases so clearly foreclose Respondents' claims in this case, Respondents' claims are patently without merit and are therefore not of sufficient substance to support federal jurisdiction.

ARGUMENT

I. THE RIGHT TO INTERSTATE TRAVEL IS THE RIGHT TO BE FREE FROM DISCRIMINATION AGAINST NONRESIDENTS, AND IS NOT IMPLICATED WHERE, AS HERE, RESIDENTS AND NONRESIDENTS ARE TREATED ALIKE.

A. *The Right To Interstate Travel Is Not A Right Of Unimpeded Movement, But Is The Right To Be Free From Parochialism.*

The scope of the constitutional right to interstate travel does not extend to the presence of an abortion protester who stands in a doorway on private property, blocking an entrance to resident and nonresident clients alike. Instead, as shown by the following exhaustive catalogue of the Court's right to interstate travel cases, *without exception, the Court has held that the right to interstate travel prohibits only (i) actual barriers to* interstate *travel and (ii)* discrimination *against nonresidents (or parochialism). See Zobel* v. *Williams*, 457 U.S. 55, 60 n.6

(1982);[1] *see generally* Note, *State Parochialism, the Right To Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989); Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794 (1987).

1. The First Hundred Years Of Interstate Travel Cases (1849-1952)

Beginning with the eloquent description of the right to interstate travel in the *Passenger Cases* dissent in 1849,[2] the Court for the next hundred years defended the right against repeated state government encroachments. The Court generally derived the right from the privileges and immunities cause of article IV,[3] but *always* defined the right of interstate travel as a protection against (i) actual barriers to interstate travel and (ii) discrimination against nonresidents.

The first state statute to be invalidated as contrary to the right of interstate travel was Nevada's tax on railroad and stage companies for every passenger carried out of the state, in *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35 (1868). The tax clearly operated as a barrier to the passengers' interstate travel. The Court found the right implicit in and essential to the structure of the Union:

---

[1] "In addition to [i] protecting persons against the erection of *actual barriers* to *interstate* movement, the right to travel, when applied to residency requirements, [ii] *protects new residents of a state from being disadvantaged* because of their recent migration *or from otherwise being treated differently from longer term residents.*" 457 U.S. at 60 n. 6 (emphasis added).

[2] 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).

[3] That clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." For most cases under this clause, the terms "citizen" and "resident" are "essentially interchangeable." Austin v. New Hampshire, 420 U.S. 656, 662 (1975); Toomer v. Witsell, 334 U.S. 385, 397 (1948).

> We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, *as freely as in our own States.*

73 U.S. (6 Wall.) at 49 (emphasis added), quoting *Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).

The following term, in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 169 (1869), the Court reiterated that the twin functions of the right to interstate travel are to prevent barriers to travel into or out of another state and to prevent parochialism. The Court described the right to interstate travel in the context of the privileges and immunities clause of article IV:

> It was undoubtedly the object of the clause in question to *place the citizen of each State upon the same footing with citizens of other States*, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; *it inhibits discriminating legislation against them by other States;* it gives them the right of free *ingress into* other States, and *egress from* them; *it insures to them in other States the same freedom possessed by the citizens of those States* in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

75 U.S. (8 Wall.) at 180 (emphasis added).[4]

The cases following *Paul* v. *Virginia* generally involved state discrimination against nonresidents in one form or another, rather than outright barriers to interstate travel such as the

[4] The Court ultimately held that the Virginia statute in question, which required foreign insurance corporations to post large bonds before doing business in the state, did not violate the privileges and immunities clause because that clause affords no protection to corporations. 75 U.S. (8 Wall.) at 177.

exit tax in *Crandall* v. *Nevada*. Thus, in *Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418 (1871), the Court struck down a Maryland statute imposing a tax on nonresident traders as violating the privileges and immunities clause of article IV:

> Taxes . . . may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, *providing the tax imposed is uniform;* but . . . *a tax discriminating against* the commodities of the *citizens of the other States* of the Union *would be inconsistent with the provisions of the Federal Constitution*. . . .
>
> . . . [T]he clause plainly and unmistakably secures and protects the right of a citizen of one State *to pass into any other State . . . without molestation; . . . and* to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.

79 U.S. (12 Wall.) at 430-31 (emphasis added).

In *Blake* v. *McClung*, 172 U.S. 239 (1898), the Court struck down a Tennessee statute giving resident creditors priority over nonresidents. The Court relied on the description of the privileges and immunities clause of article IV in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1869):

> Its sole purpose was to declare to the several States, that *whatever those rights, as you grant or establish them to your own citizens*, or as you limit or qualify, or impose restrictions on their exercise, *the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.*

172 U.S. at 252 (emphasis added). The Court described the Tennessee statute as "discrimination against citizens of other States [that is] repugnant to" the privileges and immunities clause. 172 U.S. at 254.

> [C]reditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply

> because they do not reside in that State, but are citizens residing in other States of the Union.

172 U.S. at 258.[5]

In *Chalker* v. *Birmingham & Northwestern Railway Co.*, 249 U.S. 522 (1919), the Court invalidated a Tennessee statute making the amount of an annual tax for the privilege of doing railroad construction work depend on whether the person resided in Tennessee. The infirmity was the statute's "discriminat[ion] between citizens of Tennessee and those of other States . . . contrary to § 2, Art. IV of the Federal Constitution," 249 U.S. at 526. The Court reiterated the equality principle: "Under the Federal Constitution a citizen of one State is guaranteed the right to enjoy in all other States *equality* of commercial privileges with their citizens." 249 U.S. at 527.

Similarly, in *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920), the Court held that New York's denial of certain tax exemptions to nonresidents discriminated in favor of residents in violation of the privileges and immunities clause of article IV. 252 U.S. at 79-80, citing *Blake* v. *McClung*, 172 U.S. at 247.

In *Hague* v. *CIO*, 307 U.S. 496 (1939), a case involving privileges and immunities other than interstate travel, Justice Roberts' plurality opinion described the content of the privileges and immunities clause of article IV:

> [I]t has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but on the contrary, that in any State every citizen of any other State is

[5] Cf. Williams v. Fears, 179 U.S. 270, 278 (1900) (Georgia tax on business of hiring workers for out-of-state employers did not violate privileges and immunities clause of article IV or fourteenth amendment "as there was no *discrimination* between the citizens of other States and the citizens of Georgia") (emphasis added).

> to have the same privileges and immunities which the citizens of that State enjoy. *The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.*

307 U.S. at 511 (emphasis added).[6]

A rare outright barrier to interstate travel was presented in *Edwards* v. *California*, 314 U.S. 160 (1941), where the Court struck down a California statute making it a crime to bring into the state a nonresident "indigent person." The majority grounded the decision on the commerce clause. Justice Douglas, concurring, found that the statute violated the "right to move freely *from State to State* . . . protected by the privileges and immunities clause of the Fourteenth Amendment." 314 U.S. at 178.

Finally, in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), the Court struck down South Carolina's exclusionary tax on non-resident shrimpers as violating the privileges and immunities clause of article IV.

> The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. *It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.*
>
> . . . .
>
> . . . *[T]he purpose of that clause . . . is to outlaw classifications based on the fact of non-citizenship* unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.

334 U.S. at 395, 398 (emphasis added). In *Mullaney* v. *Anderson*, 342 U.S. 415 (1952), the Court followed *Toomer* and struck down Alaska's discriminatory license fee on nonresident fishermen.

[6] Justice Roberts' opinion was joined by Justice Black in its entirety and by Chief Justice Hughes as to all but an unrelated issue, making it the plurality opinion. 307 U.S. at 500, 532.

2. The Residence Requirement Cases (1969-1986)

More recently, the right to interstate travel has been applied in cases involving state benefits conditioned on residence requirements. Though the textual source of the right has varied or not been located at all, the Court's emphasis has always been on the equality principle underlying the right.

In the first of the modern residence requirement cases involving interstate travel issues, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), the Court struck down several states' one-year residence requirement for welfare recipients as a violation of the right to interstate travel. The Court emphasized that the parochialism of the waiting-period requirement was unconstitutional:

> Thus, *the purpose of deterring the in-migration* of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose *is constitutionally impermissible*. . . .
>
> . . . .
>
> . . . The waiting-period provision *denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction*.

394 U.S. at 631, 634 (emphasis added).[7]

Next, in *Dunn* v. *Blumstein*, 405 U.S. 330 (1971), the Court struck down Tennessee's durational residence requirements for voters as a violation of the right to interstate travel, and therefore as a violation of the equal protection clause of the fourteenth amendment.

> Tennessee's durational residence laws classify bona fide residents on the basis of recent travel, *penalizing those persons, and only those persons, who have gone from one jurisdiction to another* during the qualifying period. Thus, the durational residence requirement directly impinges on the exercise of a . . . fundamental personal right, the right to travel.
>
> . . . Obviously, durational residence laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly. . .
>
> . . . Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on *only* those persons who have recently exercised that right.

405 U.S. at 338, 342 (emphasis added).

In *Dunn*, the Court *specifically distinguished situations in which old and new residents are treated alike:*

> Where, for example an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive. *See Shapiro* v. *Thompson*, 394 U.S. 618, 638 n.21 (1969).

405 U.S. at 342 n.12 (original emphasis).

In *Doe* v. *Bolton*, 410 U.S. 179 (1973), the Court struck down Georgia's residence requirement for abortion recipients as a violation of the nondiscrimination aspect of the right to interstate travel, this time locating the right in the privileges and immunities clause of article IV.

> Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply

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[7] The Court declined "to ascribe the source of this right to travel interstate to a particular constitutional provision," 394 U.S. at 630 & n.8, other than to link it to "the nature of our Federal Union and our constitutional concepts of personal liberty." 394 U.S. at 629. Nevertheless, the Court's treatment of the right to interstate travel is consistent with the Court's previous cases locating the right in the privileges and immunities clause of article IV. *See supra* Section I.A.1 and *infra* Section III.

> their trade, *Ward* v. *Maryland*, 12 Wall. 418, 430 (1871); *Blake* v. *McClung*, 172 U.S. 329, 248-256 (1898), so must it protect persons who enter Georgia seeking the medical services that are available there. *See Toomer* v. *Witsell*, 334 U.S. 385, 396-397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

410 U.S. at 200.

Similarly, in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), the Court struck down Arizona's durational residence requirement for government-paid medical care as a violation of the right to interstate travel, and therefore as a violation of the equal protection clause of the fourteenth amendment. The Court again stressed the anti-parochialism purpose of the right:

> Not unlike the admonition of the Bible that, "*Ye shall have one manner of law, as well for the stranger, as for one of your own country,*" Leviticus 24:22 (King James Version), *the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.* The State of Arizona's durational residence requirement for free medical care penalizes indigents for exercising their right to migrate to and settle in that State.

415 U.S. at 261 (emphasis added).

In the last decade, the Court has reiterated the two purposes of the right to interstate travel. In *Zobel* v. *Williams*, 457 U.S. 55 (1982), the Court struck down Alaska's dividend distribution scheme as a violation of the equal protection clause of the fourteenth amendment, relying on *Memorial Hospital*, *Dunn*, and *Shapiro*. In the course of its opinion, the Court summarized the protections afforded by the right to interstate travel:

> In addition to [i] protecting persons against the erection of *actual barriers to interstate* movement, the right to travel, when applied to residency requirements [ii] *protects new residents of a state from being disadvantaged* because of their recent migration *or from otherwise being treated differently from longer term residents.*

457 U.S. at 60 n.6.[8] *See also Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985) (following *Zobel*, and striking down the residence requirement of New Mexico's veterans' tax exemption statute as violating the equal protection clause of the fourteenth amendment).

Finally, in *Attorney General of New York* v. *Soto-Lopez*, 476 U.S. 898 (1986), the Court struck down the prior residence requirement of New York's civil service veterans' preference laws as a violation of the equal protection clause of the fourteenth amendment. Justice Brennan's plurality opinion also concluded that the residence requirement violated the right to interstate travel, which he described as "the right to migrate." 476 U.S. at 903. In his discussion of the right to interstate travel, Justice Brennan briefly surveyed the Court's right to interstate travel cases and its equal protection cases, concluding:

> The analysis in all of these cases . . . is informed by *the same guiding principle—the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.*

476 U.S. at 904 (emphasis added).

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[8] Because it viewed "right to travel analysis" as "little more than a particular application of equal protection analysis," the opinion of the Court did not explicitly identify the right to interstate travel as an independent ground for invalidating the Alaska law. *Id.* However, Justice Brennan's concurring opinion (which was joined by Justices Marshall, Blackmun, and Powell) and Justice O'Connor's concurring opinion both agreed that the "threat to free *interstate migration* provides an independent rationale for holding that law unconstitutional." 457 U.S. at 66, 72 (emphasis added).

3. The Private Action Cases

In two racial discrimination cases, the court has held that the right to interstate travel is protected against private as well as state interference. The two purposes of the right—to allow free travel across state lines and to prevent discrimination against nonresidents—remain the same.

In *United States* v.*Guest*, 383 U.S. 745 (1966), the Court upheld an indictment alleging private interference with the right to interstate travel in violation of 18 U.S.C. §241[9] (the criminal analogue of 42 U.S.C. § 1985(3)). The defendants were charged with conspiring to deprive black citizens of the "right to travel freely *to and from* the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce." 383 U.S. at 757 (emphasis added). Accordingly, the Court's discussion of the right to interstate travel focused on its prohibition of *actual barriers* to interstate travel. In holding that the indictment adequately alleged a violation of the right to interstate travel, the Court relied on the *Passenger Cases* (United States citizens "must have the right to pass and repass through every part of it without interruption") and article IV of the Articles of Confederation ("the people of each State shall have *free ingress and regress to and from* any other State"). 383 U.S. at 758 (emphasis added). The Court also relied on *Edwards* v. *California*, 314 U.S. 160, which had invalidated, on commerce clause grounds, a state law raising the actual barrier of criminal penalties against anyone bringing indigent nonresidents into the state. 383 U.S. 758-59.

Consistent with the authorities it had reviewed, the Court then stressed that the conspiracy in this case must actually

[9] That statute made it a federal crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

have been aimed at preventing *interstate* travel and not just have coincidentally impeded the movement of a nonresident:

> Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But *if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel*, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law.

383 U.S. at 760 (emphasis added).[10]

Next, in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), the Court reversed dismissal of a complaint alleging a violation of 42 U.S.C. § 1985(3) arising out of the white Mississippi defendants' conspiracy, inter alia, to prevent the black plaintiffs interstate travel. (The plaintiffs' driver was from Tennessee and the defendants mistakenly believed him to be "a worker for Civil Rights for Negroes." 403 U.S. at 90, 103.) The Court emphasized that, as pleaded, the complaint adequately alleged that the defendants sought to impose actual barriers to *interstate* travel and to discriminate against nonresidents:

> One of the results of the conspiracy . . . was to prevent the petitioners and other Negroes from exercising their "rights to travel the public highways without restraint *in the same terms as white citizens*" [of the state] . . . Under these allegations it is open to the petitioners to prove at trial that they had been engaging in *interstate travel* or intended to do so, that their federal right to travel interstate was one of the rights *meant* to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive *out-of-state* civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons.

[10] Justice Harlan dissented, arguing that, whatever the source of the right to interstate travel, it is a protection against government interference only. 383 U.S. at 763.

403 U.S. at 106 (emphasis added).[11]

B. Petitioners Did Not Interfere With Nonresidents' Travel Into Virginia And Did Not Discriminate Against Nonresidents.

1. Lack Of Interstate Barriers Or Nonresident Discrimination

Applying the foregoing authorities, Petitioners did not violate Respondents' right to interstate travel because Petitioners did not erect[]. . . . actual barriers to interstate movement" and did not "disadvantage[] [Respondents] because of their recent migration or . . . otherwise . . . treat[] [Respondents] differently from longer term residents." *Zobel*, 457 U.S. at 60 n.6.

Respondents seek to have this Court hold, contrary to all previous cases, that the right to interstate travel bootstraps Petitioners' proposed activities, which may involve simple state law obstruction aimed at both residents and nonresidents alike, into a federal constitutional violation. This is the nondiscriminatory situation that the Court has repeatedly held does not implicate the right to interstate travel. Just as "a conspiracy to rob an interstate traveler would not, of itself, violate" the right to interstate travel, so Petitioners' (anticipated) obstruction of a person who is coincidentally from out of

---

[11] In two other recent cases involving *state* action, the Court reiterated that the purpose of the right to travel is to prevent actual barriers to interstate travel and discrimination against nonresidents. In Jones v. Helms, 452 U.S. 412, 422 (1981), the Court held that "a simple penalty for leaving a State is plainly impermissible," citing Crandall, 73 U.S. (6 Wall.) 35, and Edwards, 314 U.S. 160. In Village of Belle Terre v. Borass, 416 U.S. 1 (1974), the Court upheld against a right to travel challenge a village zoning ordinance limiting land use to single-family dwellings. The Court held that the ordinance did not interfere with the right to travel or the right to migrate to and settle within a state because the ordinance "is not aimed at transients." 416 U.S. at 7.

the state does not violate the right to interstate travel. *Guest*, 383 U.S. at 760. And just as an interstate migrant who "loses his driver's license because the new State has a higher age requirement" has no constitutional claim because "the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident," so Respondents have no constitutional claim because Petitioner's proposed rescue activities would not be a penalty imposed solely on Respondents as nonresidents. *Dunn*, 405 U.S. at 342 n.12 (original emphasis).

2. Absolute Distinction From State Action And Private Action Cases

Thus, this case is critically different from all of the state action cases discussed above. Petitioners erected no barriers to travel across state lines. *Cf. Crandall*, 73 U.S. (6 Wall.) 35; *Edwards*, 314 U.S. 160; *Shapiro*, 394 U.S. 618. Nor did Petitioners discriminate at all between residents and nonresidents. *Cf. Ward*, 79 U.S. (12 Wall.) 418; *Toomer*, 334 U.S. 385; *Dunn*, 405 U.S. 330.

This case is also critically different from the private action cases, for the same reasons. Unlike the defendants in *Guest*, Petitioners did not interfere with Respondents' "travel . . . *to and from* the State of" Virginia, and did not act with the "predominant *purpose . . . to impede or prevent the exercise of the right to interstate travel.*" 383 U.S. at 757, 760 (emphasis added). *See also Griffin*, 403 U.S. at 106 (requiring plaintiffs to prove "that their federal right to travel interstate was one of the rights *meant* to be *discriminatorily* impaired by the conspiracy") (emphasis added).

Unlike the defendants in *Griffin*, Petitioners did not aim their proposed rescue activities at nonresidents; that is, Petitioners did not propose to prevent access to abortion clinics by nonresidents while allowing residents to enter. Respondents' right to interstate travel was not "one of the rights meant to be *discriminatorily* impaired by" Petitioners, and Petitioners did

not "intend[] to drive *out-of-state*" abortion seekers from Virginia. 403 U.S. at 106 (emphasis added).

II. THE RIGHT TO INTERSTATE TRAVEL DOES NOT CONFER RIGHTS ON NONRESIDENTS THAT EXCEED THE RIGHTS OF RESIDENTS. THEREFORE, THE LOWER COURTS ERRED IN CREATING A NEW FEDERAL TORT OF OBSTRUCTION THAT APPLIES ONLY TO NONRESIDENTS.

A. Under The Right To Interstate Travel, Nonresidents Are Entitled Only To The Same Rights As Residents.

The right to interstate travel has never meant more than that "a citizen of State A who ventures into State B [has] the *same* privileges which the citizens of State B enjoy." *Toomer*, 334 U.S. at 395 (emphasis added). *See also Soto-Lopez*, 476 U.S. at 904 ("the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, from other similarly situated residents"); *Zobel*, 457 U.S. at 60 n.6 (right to interstate travel "protects new residents of a state from being disadvantaged . . . or from otherwise being treated differently from longer term residents"); *Memorial Hospital*, 415 U.S. at 261 ("the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents"); *Hague*, 307 U.S. at 511 (privileges and immunities clause of article IV "prevents a State from discriminating against citizens of other States in favor of its own"); *Chalker*, 249 U.S. at 26 (tax whose amount depends on residence unconstitutionally discriminates between residents and nonresidents); *Blake*, 172 U.S. at 258 (nonresident creditors "cannot be denied equality of right" with resident creditors); *Ward*, 79 U.S. (12 Wall.) at 430-31 (sales tax may not discriminate against the goods of nonresidents); *Paul*, 75 U.S. (8 Wall). at 180 (nonresidents are to be insured "the same freedom possessed by the citizens of those States" into which the nonresidents travel).

Litigants have occasionally suggested, as Respondents do indirectly here, that nonresidents are to be treated more favorably than residents as a result of the right to interstate travel. The Court has rebuffed those suggestions. Very early, the Court defined the limits of the right to interstate travel:

> Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, *neither more nor less*, shall be the measure of the rights of citizens of other States within your jurisdiction.

Blake, 172 U.S. at 252 (emphasis added), quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77. The Court emphasized the limits of the right again in *Hague*:

> [I]t has come to be the settled view that Article IV, § 2, *does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned*, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.

307 U.S. at 511 (emphasis added).

B. The Lower Courts Exceeded The Proper Scope Of The Right To Interstate Travel In Creating A New Federal Tort Of Obstruction That Applies Only To Nonresidents.

The Fourth Circuit's decision in this case effectively converts state law obstruction into a federal constitutional tort available *only* to nonresidents, *not* because they are discriminated against in relation to residents, but *solely* because of the serendipity of their out-of-state residence. *NOW* v. *Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990). To reach this result, the Fourth Circuit ignored the established limits of the right to interstate travel and failed to examine any of this Court's

interstate travel cases or to engage in any analysis of the proper contours of the right.

Instead, the Fourth Circuit simply followed the Second Circuit's holding in *New York NOW* v. *Terry*, 886 F.2d 1339 (2d Cir. 1989), that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." *NOW* v. *Operation Rescue*, 914 F.2d at 585. However, the Second Circuit analysis of the right to interstate travel was equally insufficient. The Second Circuit leapt from the premise that the right to interstate travel is enforceable against private action to the conclusion that Operation Rescue's activities violated that right, without ever explaining why unimpeded access to an abortion clinic is protected (for nonresidents only) by the right to interstate travel. *New York NOW* v. *Terry*, 886 F.2d at 1360-61. The Second Circuit pointed to only one decision of this Court to support its conclusion, *Doe* v. *Bolton*, 410 U.S. 179, citing *Doe* for the proposition that "the right to travel 'protects persons who enter [a State] seeking the medical services that are available there.'" 886 F.2d at 1360, quoting 410 U.S. at 200.

However, the Second Circuit ignored the explicit rationale of *Doe* v. *Bolton*, which this Court had stated in the very next sentence of its opinion: "A contrary holding would mean that a State could limit to *its own residents* the general medical care available within its borders." 410 U.S. at 200 (emphasis added). *Doe* v. *Bolton*, therefore, held only that nonresidents may not be denied access to medical services *to which residents have access*.

Here, Petitioners' intended activities made no such discriminatory distinction—if Petitioners had blocked access to abortion services, they would have done so to residents and nonresidents alike. This case is therefore completely unlike *Doe* v. *Bolton*, and the Second Circuit's (and necessarily the Fourth Circuit's) reliance on that decision is erroneous.[12] The

[12] The district court in this case, apparently tracking the Second Circuit's decision, also relied solely on Doe v. Bolton. NOW v. Operation Rescue, 726 F. Supp. 1483, 1493 (E.D. Va. 1989).

right to interstate travel grants nonresidents no federal constitutional right, in addition to whatever state law rights may exist, to be free from abortion protest activities (or other protest activities) that affect residents and nonresidents alike.

III. THE RIGHT TO INTERSTATE TRAVEL, WHICH HAS ITSELF TRAVELED TO SEVERAL PROVISIONS OF THE CONSTITUTION, SHOULD BE SPECIFICALLY IDENTIFIED AS RESIDING IN THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV.

A. Most Of This Court's Right To Interstate Travel Cases Have Been Expressly Premised On Article IV.

Although various members of the Court have identified several possible sources of the right to interstate travel,[13] more often than not the source of the right has been identified as the privileges and immunities clause of article IV. *E.g.*, *Doe* v. *Bolton*, 410 U.S. at 200; *Mullaney*, 342 U.S. 415; *Toomer*, 334 U.S. at 395, 398; *Hague*, 307 U.S. at 511 (plurality opinion); *Travis*, 252 U.S. at 79-80; *Chalker*, 249 U.S. at 526; *Blake*, 172 U.S. at 252; *Ward*, 79 U.S. (12 Wall.) at 430-31; *Paul*, 75 U.S. (8 Wall.) at 180. *See also Note, State Parochialism, the Right To Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989) ("The Court has generally viewed this kind of resident/nonresident discrimination as sub-

[13] These alternative sources are: (i) the commerce clause, *see* Edwards, 314 U.S. at 173; (ii) fifth amendment due process clause, see Kent v. Dulles, 357 U.S. 116, 125 (1958); (iii) fourteenth amendment equal protection clause, *see* Hooper, 472 U.S. at 618 n.6; Zobel, 457 U.S. at 60 n.6; (iv) fourteenth amendment privileges and immunities clause, *see* Edwards, 314 U.S. at 177-78 (Douglas, J., concurring); Slaughter-House Cases, 83 U.S. (16 Wall.) at 77; and (v) "the federal structure," *see* Zobel, 457 U.S. at 67 (Brennan, J., concurring); Crandall, 73 U.S. 16 (6 Wall.) at 43. *See generally* Guest, 383 U.S. at 764-70 (Harlan J., dissenting) (surveying "the several asserted constitutional bases for the right to travel").

ject to the strictures of the privileges and immunities clause of article IV").[14]

B. History Supports Article IV As The Proper Residence Of The Right To Interstate Travel.

Some recent decisions of the Court have declined "to locate this right [to interstate travel] definitively in any particular constitutional provision." *Soto-Lopez*, 476 U.S. 902 (plurality opinion); *Jones*, 452 U.S. at 419; *Shapiro*, 394 U.S. at 630 & n.8; *Guest*, 383 U.S. at 759. Such decisions make the right unnecessarily amorphous, and, unfortunately, leave a cloud over its legitimacy.

Justice O'Connor has disagreed with the Court's non-textual approach, arguing that the "free-floating 'right to migrate,'" *Soto-Lopez*, 476 U.S. at 918 (O'Connor, J., dissenting), properly finds its residence in article IV. "[T]his analysis supplies a needed foundation for many of the 'right to travel' claims discussed in the Court's prior opinions." *Zobel*, 457 U.S. at 74 (O'Connor, J., concurring). In *Soto-Lopez*, Justice O'Connor, joined by Justices Rehnquist and Stevens, reiterated that "the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution supplies the relevant basis for analysis in evaluating claims . . . where the principal allegation is that the state scheme impermissibly distinguishes between state residents, allegedly imposing a relative burden on those who have more

[14] Recent decisions premised on the privileges and immunities clause are motivated by the same parochialism concerns underlying the right to interstate travel cases. *E.g.*, Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (New Hampshire's exclusion of nonresident attorneys from bar admission unconstitutional); United Building and Construction Trades Council v. Camden, 465 U.S. 208 (1984) (city ordinance reserving 40% of jobs on city construction projects for residents unconstitutional); Hicklin v. Orbeck, 437 U.S. 518 (1978) (Alaska's absolute preference for hiring residents in oil and gas projects with state leases unconstitutional).

recently exercised their right to establish residence in the State." 476 U.S. at 920 (O'Connor, J., dissenting).

Justice O'Connor's is the correct position, comporting best with the majority of the Court's prior decisions and with history. Professor Bogen, after exhaustively detailing the history of article IV's privileges and immunities clause, concludes: "Justice O'Connor is on excellent historical ground in rooting the right to travel in the article IV privileges and immunities clause." Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 852 (1987). That clause was designed to "creat[e] a national citizenship," *id.* at 796, and did so in large part by securing the right to interstate travel:

> [The privileges and immunities clause] referred to the rights of citizens of the nation to travel freely among the states, to become full citizens of any state they wished without discrimination based on place of prior residence, and to be free of discrimination based on nonresidence when they merely visited another state.

Id.

Thus, the Court's allusion to Old Testament law in *Memorial Hospital*, 415 U.S. at 261 ("Ye shall have one manner of law, as well for the stranger, as for one of your own country," Leviticus 24:22), is an apt description of the basic principle of the right to interstate travel, but the right *does* have a specific textual source in the Constitution. "[T]here is no need to seek Biblical support for the principle of interstate equality; the privileges and immunities clause of article IV is much closer to hand." Note, 41 STAN L. REV. at 1591.

C. Whether It Resides In Article IV Or Elsewhere, The Right To Interstate Travel Properly Protects Against State Interference Only And Does Not Apply Against Private Action As In This Case.

Contrary to the Court's holding in *Guest*, the reasoning of all of the Court's previous cases does *not* "support[] the conclusion that the constitutional right to interstate travel is a right

secured against interference from any source whatever, whether governmental or private." 383 U.S. 759-60 n.17. The Court's previous cases all addressed *government* interference and located the right in specific, albeit varying, constitutional provisions, none of which supported the extension of the right to private interference. Only by failing to identify the textual source of the right to interstate travel was the Court able to rationalize its novel extension in *Guest*, as Justice Harlan's dissent makes clear.

As Justice Harlan argued, "the several asserted constitutional bases for the right to travel"—the privileges and immunities clause of article IV, the commerce clause, and the due process clause of the fifth amendment—all address only state action. 383 U.S. at 764, 767-70 (Harlan, J., dissenting).[15]

> [As to article IV,] [i]t is . . . apparent that the right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union. In the one case in which a private conspiracy to obstruct such movement was heretofore presented to this Court, the predecessor of the very statute we apply today was held *not* to encompass such a right.
>
> . . . .
>
> . . . [As to the commerce clause,] this approach to the right to travel, like that found in the privileges and immunities cases, is concerned with the interrelation of state and federal power, *not . . . with private interference*.
>
> . . . .
>
> I cannot find in any of this past case law any solid support for a conclusion that the Commerce Clause embraces a right to be free from private interference.
>
> . . . .
>
> [As to fifth amendment due process,] [v]iewing the right to travel in due process terms, of course, would clearly make it inapplicable to the present case, for due process speaks only to *governmental* action.
>
> . . . .
>
> This survey of the various bases for grounding the "right to travel" is conclusive only to the extent of showing that there has never been an acknowledged constitutional right to be free from private interference, and that the right in question has traditionally been seen and applied, whatever the constitutional underpinning asserted, only against *governmental* impediments.

Id. at 767, 768-69, 770, 771 (emphasis added).

The same is true of the two other occasionally asserted bases of the right, the fourteenth amendment and "the federal structure." *See supra* note 14. The fourteenth amendment by its terms is limited to state action ("No State shall . . . abridge the privileges or immunities of citizens . . . nor deny . . . the equal protection of the laws"). The "federal structure" basis for the right similarly encompasses only state action that interferes with the ties that bind the nation. *See Zobel*, 457 U.S. at 67 (Brennan, J., concurring) ("I find [the right to interstate travel's] unmistakable essence in that document that transformed a loose confederation of States into one Nation"); *Crandall*, 73 U.S. (6 Wall.) at 44 ("no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established").

In addition to the historical and textual arguments, two prudential considerations support the limitation of the right to interstate travel to freedom from state interference. First is the vast difference in the effect of state interference compared

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[15] Assuming arguendo that the commerce clause authorizes Congress to prohibit private interference with the right to interstate travel, and assuming that Congress could define interstate travel to include access to the entrance of an out-of-state abortion clinic, Congress has not done so. As Justice Harlan noted with regard to the criminal analogue of § 1985(3), "No 'right to travel' can be found in [18 U.S.C.] § 241 or in any other law of the United States." Guest, 383 U.S. at 763 (Harlan, J., dissenting). Absent such an independently existing right, Respondents have no cause of action under 42 U.S.C. § 1985(3). Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366, 372 (1979).

to private interference, as well as the greater difficulty in remedying state interference, as noted by Justice Harlan. "There is a difference in power between States and private groups so great that analogies between the two tend to be misleading." *Guest*, 383 U.S. at 772 (Harlan, J., dissenting).

Second, "[t]o decline to find a constitutional right [against private interference] does not render the Federal Government helpless." *Id.* Congress already "has wide authority to legislate in this area" under the commerce clause (to the extent widespread private action sufficiently impedes commerce), and under the Civil Rights Act of 1964 and perhaps other sources. *Id.* Therefore, it is not only constitutionally erroneous but also "unnecessary . . . to strain to find a dubious constitutional right." *Id.*

Thus, the Court should overrule that portion of *Guest* that, contrary to constitutional language and without statutory justification, extends the right to interstate travel to private action.[16]

IV. RESPONDENTS' CONSTITUTIONAL CLAIM IS NOT OF SUFFICIENT SUBSTANCE TO SUPPORT FEDERAL JURISDICTION

A. Federal Jurisdiction Does Not Exist Where Prior Decisions Render The Claims Patently Without Merit.

Federal courts may entertain constitutional claims only when they are "of sufficient substance to support federal jurisdiction." *Hagans* v. *Lavine*, 415 U.S. 528, 536 (1974). The Court summarized the doctrine of "constitutional insubstantiality" in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978):

[16] The result in Guest need not change. Justice Harlan concurred in the holding that the indictment should be upheld, but on the grounds that it sufficiently alleged state interference with interstate travel. 383 U.S. at 774.

> [T]he test is whether "the cause of action alleged is *so patently without merit* as to justify . . . the court's dismissal for want of jurisdiction.'" *Hagans* v. *Lavine*, 415 U.S. 528, 542-43 (1974), quoting *Bell* v. *Hood*, [327 U.S. 678, 683 (1946)]. (Emphasis added.) *See also Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974) (test is whether right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy").

438 U.S. at 70-71. *See also Hagans*, 415 U.S. at 536-38; *Goosby* v. *Osser*, 409 U.S. 512, 522 (1973) (claims not foreclosed by prior decision because prior decision specifically anticipated differences in claims and suggested those differences might affect outcome); *Siler* v. *Louisville & Nashville Railroad Co.*, 213 U.S. 175, 191 (1909) ("the Federal question must not be merely colorable").[17]

B. This Court's Prior Decisions Concerning The Right To Interstate Travel Render Respondents' Claims Patently Without Merit.

Respondent's constitutional claim against Petitioners is patently without merit because it is foreclosed by the Court's previous cases involving the right to interstate travel. As demonstrated above, those cases clearly establish that the right to interstate travel is not infringed where there is no actual barrier to travel across state lines and no discrimination against nonresidents. *See Zobel*, 457 U.S. at 60 n.6. Here, it is undisputed that Petitioners' proposed activities (i) would not have prevented or interfered with Respondents' travel into or out of Virginia and (ii) made no distinction between residents and nonresidents.

[17] Applying this doctrine of constitutional insubstantiality, the Second Circuit recently dismissed the Town of West Hartford's RICO action against Operation Rescue because the town could not demonstrate extortion under any conceivable theory. Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990).

CONCLUSION

The Fourth Circuit incorrectly held that Petitioners' activities would violate Respondents' right to interstate travel. The right to interstate travel is not a right to unimpeded movement within a state, but is the right to move across state lines and to be treated the same as residents are treated. It is not a right to be treated more favorably than residents, so that the Fourth Circuit incorrectly converted potential state law obstruction claims into federal constitutional claims for non-residents only. The privileges and immunities clause of article IV should be recognized as the textual and historical source of the right to interstate travel. (Wherever the right is located, however, it does not protect against merely private action such as Petitioners'.) In light of this Court's prior decisions on the right to interstate travel, Respondents' constitutional claim is patently without merit, so that it is not of sufficient substance to support federal jurisdiction.

For the forgoing reasons, amici curiae respectfully urge this Court to reverse the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

Date: April 11, 1991

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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LEGISLATIVE MATERIAL

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BRIEF OF FEMINISTS FOR LIFE OF AMERICA, PROFESSIONAL WOMEN'S NETWORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI

Feminists for Life of America ("FFLA") is an organization of pro-life feminists with national headquarters in Kansas City, Missouri, and state chapters throughout the nation. FFLA and its state chapters engage in educational activities, lobbying and advocacy designed to foster respect for human life and social and economic justice for women. FFLA intends in this *amicus* brief to address issues relevant to the first two questions presented in the Petition for Writ of Certiorari:

> 1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. Sec. 1985(3)?
>
> 2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. Sec. 1985(3)?

Feminism presupposes that a pregnant woman "is not isolated in her privacy," *Roe v. Wade,* 410 U.S. 113, 159 (1973), and that her connection to the unborn child has a profound effect upon her life, that of her child, and society at large. *See* West, *Jurisprudence and Gender,* 56 U. Chi. L. Rev. 1, 3 (1989). Thus, many feminists take issue with the implication that women are incapable of independent thought on the issue of abortion, or that "true" feminists are of only one view. Neither assumption withstands empirical validation—today, or historically. Public opinion surveys consistently show that a majority of American women are opposed to abortion in most of the circumstances in which it is currently performed. Furthermore, FFLA has marshalled compelling evidence that the leading feminists of the 19th century condemned abortion in the strongest terms, for reasons which remain relevant today. This Brief is largely devoted to presentation of this evidence.

The Professional Women's Network (PWN), founded in 1984, is a national organization representing women

in a variety of professional and business fields. The objectives of PWN are: to advocate respect for human life and the well-being of all women, regardless of race, creed, or economic status; to provide a system for women to help other women in crisis pregnancies through personal community involvement; to urge passage of pro-life legislation that protects the preborn child *and* affords meaningful (financial, legal, educational) assistance to women who choose to carry their pregnancies to term; and to promote public awareness of women's issues and relay accurate information about abortion.

The state legislators and academicians identified in the Appendix share the viewpoint of FFLA and PWN that opposition to abortion is essential to advancing the genuine interests of women in society.

SUMMARY OF THE ARGUMENT

Respondents ask this Court to determine that opposition to abortion constitutes invidiously discriminatory animus against women for purposes of 42 U.S.C. § 1985 (3). The proposition is absurd. There is no evidence that the actions of the petitioners in blocking access to abortion clinics was motivated by anything other than sincere conviction that abortion is the taking of innocent human life. Furthermore, it is clear that opposition to abortion is not a gender-specific trait. The named petitioner in this matter is a woman; hundreds of women across the nation participate in acts of civil disobedience such as those alleged to have been planned by the petitioners. Organizations of women who have had abortions, regret that decision, and work to end conditions which cause women to resort to abortion have memberships in the thousands. Public opinion polls demonstrate that there is no "gender gap" on the abortion question. Women are at least as likely as men to oppose abortion on moral and legal grounds.

The literature of the early feminist movement in the United States demonstrates that opposition to abortion at the time of the passage of the Ku Klux Klan Act was

not premised upon animus against women, but upon the firm conviction that abortion oppressed women, as well as destroyed the life of the unborn child. The early feminists defied many social conventions, but saw abortion, which they consistently referred to by terms such as "child-murder," as the result of unequal treatment of women, not a solution to that problem. They supported laws restricting abortion, as well as vigorous efforts against what they considered to be its root causes. Their activity shows that opposition to abortion can be motivated by genuine concern for the interests of women, a concern which complements respect for unborn human life.

The legislative history shows that § 1985(3) was intended to protect fundamental rights of citizenship from conspiracies which impaired the ability of the states to guarantee equal protection under the law. No such conspiracy has been shown to exist in this case. There is no evidence that Congress intended to protect rights which did not reflect its central concern for the rights of political participation of newly-enfranchised citizens. "Seeking abortion" cannot be termed an essential right of national citizenship, since it is not a right indispensable to a free society.

Current feminist thought is divided on whether abortion is essential to the emancipation of women, or, as the early feminists believed, a badge and incident of the oppression of women. By claiming that the Petitioners' alleged activity satisfies the "class animus" requirement of § 1985(3), the Respondents would have this Court decide this controversy, and do so at the behest of commercial abortion providers, and on the basis of a record that is devoid of any evidence of animus against women. Furthermore, Respondents would have this Court expand the applicability of § 1985(3) to situations far beyond the scope intended by Congress, and permitted by the previous construction of § 1985(3) by this Court.

ARGUMENT

I. OPPOSITION TO ABORTION DOES NOT CONSTITUTE INVIDIOUS DISCRIMINATORY ANIMUS AGAINST A "CLASS" PROTECTED UNDER 42 U.S.C. § 1985(3).

A. The Class of "Women Seeking Abortion" Is Not a Proper "Class of Persons" under Section 1985(3).

The court of appeals below, along with the Second Circuit, has engaged in dangerous and unwarranted expansions of the definition of "invidiously discriminatory animus," and of the "classes of persons" who may seek relief, under 42 U.S.C. § 1985(3). *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted*, No. 90-985 (Feb. 25, 1991); *New York State N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). In holding that a subgroup of gender defined by a particular activity, i.e., "women seeking abortion" is a proper "class of persons" under § 1985(3), and that opposition to abortion is itself conclusive evidence of a discriminatory animus toward women, these circuits have spurned this Court's strong caution against applying § 1985(3) to any conspiracy motivated by other than racial animus in the absence of "convincing support" in the legislative history. *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 837 (1983).

Proof of an "invidiously discriminatory animus" behind the conspirators' action is required to establish a violation of 42 U.S.C. § 1985(3). *Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971) (note omitted); *Scott*, 463 U.S. at 837. Despite repeated emphasis on the narrowness of "class-based animus," and stern warning against using § 1985(3) as a "general tort law," *Griffin*, 403 U.S. at 88, the court of appeals has equated opposition to abortion with invidious, gender-based discrimination. Moreover, it has done so without a shred of evidence in the record that the motivation of the petitioners was anything other than a sincere belief that abortion is abhorrent and that women and other members of society alike are harmed by abortion on demand.

In *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170 (C.D. Cal. 1989), the court cogently explained why the sub-class of "women seeking abortions" is not a class intended to be protected by § 1985(3):

> The Court disagrees with the proposition that any "particular [sub]class of women," . . . is a protected class. For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender, i.e., it is the "seeking abortion" trait which animates the defendants' actions and must be the basis for making the . . . [Section 1985(3) analysis.]

Id. at 1171. *See also, Mississippi Women's Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989).

The National Organization for Women and the respondents engaged in the business of performing abortions are entitled to their own viewpoint: that a guarantee of unfettered availability of abortion on demand without public *or private* interference is an indispensable component of equality and autonomy for women; and, that opposition to abortion is the absolute equivalent of sex discrimination. However, this Court has repeatedly held that restrictions upon abortion do not constitute evidence of discriminatory intent, nor a violation of equal protection. *See Harris v. McRae*, 448 U.S. 297, 322-23 & n. 26 (1980); *Maher v. Roe*, 432 U.S. 464, 469-71 (1977); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 66-67 (1976). Any argument that women are entitled to access to abortion free from public or private interference in order to be assured equal protection of the law must fail. *See generally*, Smolin, *Why Abortion Rights Are Not Justified By Reference to Gender Equal-*

ity: A Response to Professor Tribe, 23 J. Marshall L. Rev. 621, 639 (1990). Indeed, the contrast between the jurisprudential firestorm over abortion rights and the broad consensus concerning authentic gender discrimination issues—such as women's rights to equal pay and promotion opportunities and freedom from sexual harrassment in employment, could not be more striking.

> The failure of the Supreme Court abortion decisions to persuade or to be practically implemented starkly contrasts with the success of the Court's gender discrimination decisions. The contrast is particularly notable because the Court dealt with both subjects during the same time period and because the impact of both lines of decisions upon existing state laws was revolutionary. Legislatures which steadfastly refused to endorse the abortion privacy doctrine have embraced the principles of gender equality enunciated by ~~the~~ Court and incorporated them into numerous laws.

Wardle, *Rethinking* Roe v. Wade, 1985 Bringham Young L. Rev. 231, 249-50.

B. Opposition to Abortion is At Least Equally Strong Among Women as Among Men, and Provides No Basis for a Finding of Sex Discrimination or Any Invidious Discriminatory Animus Toward Women.

One reason for the continuing controversy concerning abortion on demand is that a majority of American women do not agree with respondents' underlying assumption that equal protection under the Fourteenth Amendment requires unlimited abortion on demand. A recent poll conducted by the Gallup Organization revealed that there is no "gender gap" on abortion: indeed, women are as likely, and in some cases, more likely than men to oppose abortion.[1] For example, only 17

[1] Americans United for Life, *Abortion and Moral Beliefs, a Survey of American Opinion* (Executive Summary) (1991). Three copies of the Executive Summary and of the complete Tabular Results of this comprehensive survey of American public opinion on abortion have been lodged with the Office of the Clerk simultaneously with the filing of this Brief.

percent of women and 20 percent of men believe that an abortion is acceptable, even during the first trimester, if the pregnancy was unplanned and would interrupt a woman's career. A mere 7 percent of women and 11 percent of men believe a first trimester abortion is acceptable as a means of birth control.[2] Only 26 percent of women and 30 percent of men believe first trimester abortion is acceptable if continuing the pregnancy would require a teenager to drop out of school, and 20 percent of women and 30 percent of men approve of abortion where the birth of a child would create a financial burden. And 53 percent of women and 47 percent of men believe the unborn child's "right to be born" outweighs, at the moment of conception, the woman's "right to choose" whether she wants to have a child.[3]

Similar responses have been repeatedly obtained in recent polls. *See, e.g.*, Wirthlin Group Survey, Jan. 15-17, 1990 in *Public Opinion*, May/June 1989 at 36. The Wirthlin survey reveals that 11 percent of married women and 9 percent of unmarried women responded that it should not be permitted at all, and 44 percent of married women and 42 percent of unmarried women responded that it should only be permitted in cases of rape, incest or to save the life of the mother.[4] This demonstrates that a majority (55 percent of married women and 53 percent of unmarried women) think that most of the abortions actually performed today should not be permitted. *See also*, Smolin, *supra* at 646 "[o]pinion polls show little or no difference between how women and men view abor-

[2] This is particularly significant in light of the fact that over 43 percent of the approximately 1.6 million abortions performed in the United States in 1987 were "repeat abortions," i.e., performed on women who have received at least one prior abortion. Henshaw, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Plan. Persp. 158 (1988).

[3] Executive Summary, *supra* note 1 at 20-21.

[4] The question posed was: "Should abortion be legal as it is now, or legal only in such cases as rape, incest, or to save the life of the mother, or should it not be permitted at all?"

tion rights," *citing, e.g., The Connecticut Mutual Life Report on American Values in the '80s*, 92 (1981); G. Gallup, Jr., *The Gallup Poll: Public Opinion 1986*, 49 (1987).

Opposition of American women to abortion is also reflected in the large female membership of organizations such as the National Right to Life Committee, Concerned Women for America, American Life League,[5] and such groups as *amici* FFLA and PWN. In addition, groups such as Women Exploited by Abortion and American Victims of Abortion represent women who have had abortions, and now oppose abortion because of the conviction, based on their experience, that abortion ultimately exploits women.[6]

C. There is No Evidence of Class-Based Animus in This Case.

The activity engaged in by the petitioners does not convert their gender-neutral opposition to abortion into action representative of class-based animus. Women, such as lead petitioner Jayne Bray, participate in "rescues" at abortion clinics across the nation. "All-women rescues" planned and led exclusively by women and in which

[5] Over 140,000 of the 278,000 members of American Life League, including its president, are women, while Concerned Women for America's total membership of 755,000 includes 646,000 women. One of the nation's largest prolife organizations, the National Right to Life Committee, while it does not maintain membership statistics by gender, is led by a board of directors of which 65 percent are women and a senior management staff which is 61 percent female. In addition, more than 60 percent of the delegates to the 1990 NRLC convention were women.

[6] *See, e.g.*, Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. Rev. 231, 244-245 (describing the growing recognition of the exploitative practices of the abortion industry); D. Reardon, *Aborted Women: Silent No More* (1987); A. Speckhard, *Psycho-Social Aspects of Stress Following Abortion* (1987); Levin, *Ectopic Pregnancy and Prior Induced Abortion*, 72 Am. J. of Pub. Health 253 (1982); Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in *New Perspectives on Human Abortion*, 69 (Hilgers, Horan, Mall, ed. 1981).

only women participated have been held in several cities, resulting in hundreds of women being arrested for their opposition to abortion. *See, e.g., Women Picket Clinic*, Phila. Inquirer, Feb. 4, 1990 at B1, col. 8 (describing rescue at Planned Parenthood facility at which 149 women were arrested).

There is nothing in the record of this case to show that any of the activities were directed against women as a class, or even against only women seeking to enter the abortion clinic. Rather, the record is clear that *all* persons—including male clinic personnel, and men accompanying women to the clinic—would be prevented from entering the clinic during the "rescue" activity.[7] The activity of the petitioners would discriminate neither in favor of, nor against, men who sought to enter the clinic, any more than it would discriminate for or against women. It is the activity of the clinic, not the gender of the people engaged in that activity, which motivates the activity of the petitioners. As the Fifth Circuit stated in *Mississippi Women's Medical Clinic*,

> [the] protestors (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc. In fact, [the record] indicates that the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions. It is useful to reiterate that the legislative history indicates that Congress wanted to evaluate "class-based invidious discrimination" through the lens of "animus or motivation," not impact.

866 F.2d at 794 (emphasis in original) (*citing Scott*, 463 U.S. at 834-835). Thus, petitioners did not act with

[7] The respondents conceded this point before the Court of Appeals, acknowledging that the rescue blockade permits" '[n]o one . . . to enter past the rescuers. *Neither women nor men.* Doctors, nurses, patients, staff, abortion-bound women—all are prevented from entering the abortuary . . .'" *N.O.W. v. Operation Rescue*, Brief for Appellees and Cross-Appellants at 5 (emphasis supplied).

"a class-based animus, that is a prejudice against a group of persons or against a particular person *because of his membership in that group.*" *Roe v. Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir.) (emphasis supplied), *cert. denied*, 484 U.S. 848 (1987).

As in *Mississippi Women's Clinic* and *National Abortion Federation v. Operation Rescue*, the gravamen of this dispute is not about class-based prejudices, animus, or ill will toward any protected class of persons. What separates petitioner Jayne Bray (and all of the other American women who oppose abortion on demand) from the purported § 1985(3) "class" declared by the court of appeals is not their *gender*, but their political and moral beliefs regarding *abortion*.[8] This difference neither qualifies the purported class as a plaintiff class under § 1985 (3), nor subjects Ms. Bray and her counterparts to liability under that section.

II. THE HISTORICAL RECORD OF EARLY FEMINIST OPPOSITION TO ABORTION DEMONSTRATES THAT AT THE TIME OF THE PASSAGE OF THE KU KLUX KLAN ACT, OPPOSITION TO ABORTION WAS PREMISED NOT UPON ANIMUS AGAINST WOMEN, BUT UPON THE CONVICTION THAT ABORTION CONSTITUTED THE OPPRESSION OF WOMEN AS WELL AS THE KILLING OF CHILDREN.

A. The Early Feminists, Although Critical of Prevailing Cultural Attitudes Regarding Sexuality and the Role of Women in Marriage, Were Resolutely Opposed to Abortion.

Feminism as a social movement has existed throughout most of American history, *see* P. Davis, *History of the*

[8] Just as there is no showing of specific gender-based animus among any of the petitioners in this case, there is no showing of of any animus based upon political or moral beliefs. Furthermore, there is absolutely no evidence that the *political* or *citizenship* rights of the respondents, or of any class they purport to represent, have been frustrated by the actions of the petitioners. *See* discussion *infra* at Section III.

National Women's Rights Movement (1871), and the issue of abortion has been closely tied to feminist criticism of the social oppression and disenfranchisement of women. *See* M. Derr, *"Man's Inhumanity to Woman, Makes Countless Infants Die": The Early Feminist Case Against Abortion* (1991).[9] Contrary to prevailing assumptions, however, feminists have not traditionally argued for the moral and legal acceptability of abortion. The nineteenth century founding mothers of the women's movement did not view legalized abortion as a solution to, but rather, as an abhorrent consequence of, the oppressions and disenfranchisement of women.

The testimony of these women—including Elizabeth Cady Stanton, Victoria Woodhull, and Matilda Gage—reveal a radical stance against the mistreatment of women inside and outside of marriage, a frank understanding and acceptance of female sexuality, and an uncompromising view that abortion is "ante-natal murder," "child-murder," or "ante-natal infanticide." The early feminists did not oppose abortion out of adherence to social norms.[10] As will be seen below, they were not

[9] Copies of this privately-published monograph have been lodged with the Clerk of the Court simultaneously with the filing of this Brief. Its editor, Mary Krane Derr, a graduate student at the University of Chicago, provided the research for this section of the Brief.

[10] Nor did the early feminists live at a time when abortion was unknown or not a matter of controversy. Voluminous evidence points to an increase in abortion practice during the mid-nineteenth century.

One measure of increased laxity toward abortion is the proliferation of newspaper advertisements for abortive remedies, typically phrased in euphemistic language such as "female irregularities" and "blockage of menses." *See* M. Olasky, *The Press and Abortion, 1838-1988*, 4-9, 14-19 (1988); J. Mohr, *Abortion in America*, 47-65 (1977). The pioneer of such enterprise was one Ann Lohman, a New York midwife trading under the name "Madame Restell." *Id.* at 4-5. Lohman's practice became so widespread and notorious that the term "Restellism" was commonly used to derogate the practice of abortionists. *See Restellism Ex-*

timid in challenging prevailing and fundamental notions of the marriage relationship, some of which prevail to this day.

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posed, The Revolution, 4 (22):346 (Dec. 2, 1869), discussed at page 17, *infra*.

Medical literature of the period also documented an increase in abortion. Dr. Andrew Nebinger, a Philadelphia physician, noted that "[t]he commission of this crime [abortion] is not confined to the harlot . . . [there is] a large proportion of devotees among the refined [of] the higher classes." Nebinger, *Criminal Abortion: Its Extent and Prevention*, 31 (1870) (Toner Collection, Library of Congress). He estimated, based on his own questioning of 59 colleagues, that approximately half of all miscarriages were wilfully or criminally produced. *Id.* at 10. See also J. Cowan, *The Science of New Life*, 275 (1871) ("the licentiousness of the man and bondage of the woman . . . [led to] "the monstrous crime . . . the murder of the unborn."); *Medical Intelligence*, 51 The Boston Medical and Surgical Journal 204 (1854) ("Both women and men abound, in all our large cities, who have a decided and acknowledged reputation for performing the murderous operation."); McCollom, *Criminal Abortion*, Transactions of the Vermont Medical Society for 1865 ("the crime is frequent—and applications are continually made to apothecaries as well as physicians, for drugs for this purpose—and many of the applicants appear to have no idea of the criminality of the act, or any abhorrence of such a violation of the positive laws of God and Man."); Turner, *Criminal Abortion*, Boston Medical and Surgical Journal 299 (April 21, 1870) ("In these days, when theft is called peculation, robbery of public funds financial irregularity, &c., how can we expect to recognize as murder that which is called simply "getting rid" of something, or being "helped" out of trouble?"); Stone, *Report on the Subject of Criminal Abortion*, Transactions of the Iowa State Medical Society, Vol. I, 1867 ("Yea, even *medical* men are to be found who are too lazy to work, too ignorant to think, and too heartless to feel, who, for pecuniary recompense, will poison the fountains of life, or forcibly induce labor to the certain destruction of the foetus, and not unfrequently to the destruction of the parent.")

An 1871 investigative story on abortion practice in New York City concluded that:

> The enormous amount of medical malpractice [the common euphemism for abortion] that exists and flourishes, almost unchecked, in the City of New York, is a theme for most serious consideration. Thousands of human beings are thus murdered

Early feminist opposition to abortion was deep-seated, and addressed the *causes* of abortion, not just the practice. In this way, it was distinguished from other anti-abortion efforts including those of the American Medical Association. *See* L. Gordon, *Woman's Body, Woman's Right* (1977). Feminists documented that abortion was caused by, among other things, culturally enforced ignorance about sexual and reproductive physiology, especially family planning and fetal development; cultural construction of pregnancy as a pathological condition; a sexual double standard which permitted men to be sexually and parentally irresponsible; the social valuing of "legitimacy" over children's lives and women's well-being; and lack of social and economic support for mothers, especially single ones. *See generally*, Derr, *supra*, at i-iii. Two overriding principles emerge from this early feminist literature: a condemnation of abortion as the murder of children; and the conviction that marital, social, and economic liberation of women would bolster, and not undermine, protection for the unborn.

B. The Early Feminists Considered Abortion to be the the Killing of Children.

The nineteenth-century feminists, like the petitioners here, and millions of others who engage in a variety of educational, political, and protest activities on behalf of the unborn, understood that life begins at conception, and thus, induced abortion is the killing of that young life. Dr. Alice Bunker Stockham, a pioneer in promoting women's health issues, including the need for family planning, wrote in 1887:

> When the female germ and male sperm unite, then is the inception of a new life; all that goes to make up a human being—body mind, and spirit, must be

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before they have seen the light of this world, and thousands upon thousands more of adults are irremediably robbed in constitution, health, and happiness.

St. Clair, *The Evil of the Age*, New York Times, August 23, 1871, p. 6.

> contained in embryo within this minute organism. *Life must be present from the very moment of conception.* If there was not life there could not be conception. At what other period of a human being's existence, either pre-natal or post-natal, could the union of soul and body take place? Is it not plain that the violent or forcible removal of it from the citadel of life, is its premature death, and hence the act can be denominated by no more mild term than murder, and whoever performs that act, or is accessory to it, guilty of the crime of all crimes?

A. Stockham, *Tokology*, 246 (1887). Historian Carl Degler has noted that this valuation of fetal life at all stages "was in line with a number of movements to reduce cruelty and to expand the concept of the sanctity of life . . . the elimination of the death penalty, the peace movement, the abolition of torture and whipping in connection with crimes"—all movements which feminists supported. "The prohibiting of abortion was but the most recent effort in that larger concern." C. Degler, *At Odds: Women and Family in America From the Revolution to the Present*, 247 (1980).

Victoria Woodhull and Tennessee Claflin, sisters and co-publishers of a radical suffragist weekly, condemned abortion, as well as infant mortality, in an 1874 editorial:

> Children die because they are not properly cared for. If adults received equally improper treatment as children received, they would die at the same rate; but adults, being capable of judging for themselves as to what is proper and what is improper, by choosing the former, decrease the death-rate ten times below that which obtains among the classes who depend upon others for their treatment. . . .
>
> But this fact regarding the indifference to life that exists among parents is not perhaps the worst feature of modern society. It is not only a fact that this terrible death-rate persistently continues among children, but there is still another death method not included in its horrible details, which, if possible, is

> still more revolting, and which is nontheless a slaughter of the innocents.
>
> . . . We are aware that many women attempt to excuse themselves for procuring abortions, upon the ground that it is not murder. But the fact of resort to so weak an argument only shows the more palpably that they fully realize the enormity of the crime. Is it not equally destroying the would-be future oak, to crush the sprout before it pushes its head above the sod, as it is to cut down the sapling, or cut down the tree? Is it not equally to destroy life, to crush it in its very germ, and to take it when the germ has evolved to any given point in its line of development? Let those who can see any difference regarding the time when life, once begun, is taken, console themselves that they are not murderers having been abortionists.

The Slaughter of the Innocents, Woodhull and Claflin's Weekly, June 20, 1874.

Feminist opposition to abortion was influenced by increasing awareness during the nineteenth century of the humanity of the unborn child. Feminists held that dissemination of this new knowledge would reduce the abortion rate. Dr. Frederick Hollick, in the *Matron's Manual of Midwifery* (1848), wrote that ignorance of the processes of conception, gestation, and birth "has led to untold evils, which can never be corrected till [women] become more enlightened respecting themselves." One of these evils was abortion. Hollick not only devoted a chapter of his *Matron's Manual* to a month-by-month account of fetal development, he also sought to address "the want of simple and reliable means of prevention," which "caused the horrible practice of procuring abortion." F. Hollick, *The Marriage Guide*, 333-334 (1850).

Based upon such scientific evidence, early feminists recognized that abortion was killing from the time of conception, and rejected the outdated "quickening" distinction. As Eliza Bisbee Duffy, another advocate of fam-

ily planning and sex education, wrote in *The Relations of the Sexes* (1876):

> Abortion, intentionally accomplished, is criminal in the first degree, and should be regarded as murder. Yet women have been taught to look lightly upon this offense, and to consider it perfectly justifiable up to the period of quickening. "The embryo has no life before that period," they will say in justification of the act. I have even heard a woman, who acknowledged to several successful abortions, accomplished by her own hands upon herself, say, "Why there is no harm in it, any more than in drowning a blind kitten. It is nothing better than a kitten, before it is born." I was a young girl myself when I heard this, and I accepted the statement as a true one. Nor did I dream of questioning it until, in later years, I became thoroughly acquainted with sexual physiology, and comprehended the wonderful economy of nature in the generation and development of the human germ.

Id. at 274-275. *See also* L. Gordon, *Woman's Body, Woman's Right*, 129 (1977).

In *Roe v. Wade*, this Court endorsed the argument that 19th century anti-abortion legislation was intended to protect the health of women, not to protect prenatal life. 410 U.S. 113, 151 (1973). Scholars have thoroughly rebutted this argument, citing state court decisions and other materials which establish that a chief purpose of such legislation was protection of the unborn. *See Gorby, The Right to an Abortion, the Scope of Fourteenth Amendment "Personhood" and the Supreme Court's Birth Requirement*, 1979 So. Ill. L. Rev. 1, 16-17, n. 84; Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1273-75 (1975). To these rebuttals should be added the voices of the founders of the women's rights movement. In criticizing abortion, they were cognizant of the grave risks, physical and emotional, which it imposed upon women. Yet, they also equivocally held abortion to be the killing of children.

C. The Early Feminist Opposition to Abortion Included Support for Legal Restrictions Upon Abortion, and Enforcement of Such Restrictions.

Although much early feminist opposition to abortion focused on prevention and elimination of the circumstances which led women to seek abortions, feminists also supported legal sanctions against the proliferating abortion trade epitomized by Madame Restell, and known commonly as "Restellism". Dr. Charlotte Denman Lozier, a professors at the New York City Medical College for Women, won acclaim in both the popular and feminist press for her unstinting opposition to abortion in the following case:

> [Dr. Lozier] was applied to last week by a man protending to be from South Carolina, Moran by name, as he also pretended, to procure an abortion on a very pretty young girl apparently about eighteen years old. The Dr. assured him that he had come to the wrong place for any such shameful, revolting, unnatural and unlawful purpose. She proferred to the young woman any assistance in her power to render, at the proper time, and cautioned and counseled her against the fearful act which she and her attendant (whom she called her cousin) proposed. The man becoming quite abusive, instead of appreciating and accepting the counsel in the spirit in which it was proferred, Dr. Lozier caused his arrest under the laws of New York for his inhuman proposition, and he was held to bail in a thousand dollars for appearance in court.

Restellism Exposed, The Revolution, 4(22):346 (Dec. 2, 1869). The Springfield (Mass.) *Republican*, a paper with strong feminist sympathies, praised Dr. Lozier's actions, and suggested that advancement of women into the medical profession would undercut its complicity in abortion.

> May we not hope that the action of Mrs. Lozier in this case is an earnest of what may be the more general practice of physicians if called upon to commit this crime, when women have got a firmer foothold and influence in the medical profession. Some

> bad women as well as bad men may possibly become doctors, who will do anything for money: but we are sure most women physicians will lend their influence and their aid to shield sex from the foulest wrong committed against it. It will be a good thing for the community when more women like Mrs. Lozier belong to the profession.

Id.

Dr. Lozier's death, at age 26, shortly following this incident prompted the following eulogy from Pauline Wright Davis, an eminent suffragist and editor of *The Revolution.*

> Her steady, persistent, unwavering integrity, and her high sense of duty were strongly marked. Her recent action, prompt and incisive, against a high-handed crime cannot be too much commended. She chose to bear reproach and bitterness, rather than a stain upon her conscience. The impression will long remain with us of her pure, womanly grace and sweetness. Her real strength did not reveal itself in the brief interview we had with her; it was not till she came out firmly to stay the prevalent sin of infanticide that we knew the women in all her greatness.
>
> Her sense of justice would not allow her to let the wrong-doer escape the penalty of the law, while at the same time she pitied and tenderly cared for the victim. We have been amazed to hear her denounced for this brave, noble act on the ground of professional privacy. It is said she had not right to expose the outrage of having one thousand dollars offered her to commit murder.
>
> The murder of the innocents goes on. Shame and crime after crime darken the history of our whole land. Hence it was fitting that a true woman should protest with all the energy of her soul against this woeful crime.

The Revolution, 5(3): 42, Jan. 20, 1870

The historical and editorial context of these reports demonstrates the depth of feminist conviction against

abortion, and willingness to use the law in opposition to it. Dr. Lozier acted at the height of the "physician's crusade" to pass new antiabortion legislation in the states, and stiffen enforcement of existing laws. Had the feminist press [11] opposed this effort, it would hardly have criticized so pointedly those who denounced Dr. Lozier for turning "Mr. Moran" over to the law. Several months before the Lozier incident, Susan B. Anthony wrote that she "deplore[d] the horrible crime of child-murder" and "earnestly" desired its suppression. The Revolution, 4(1):4 (July 8, 1869). She added that prevention, not punishment, would be needed to halt abortions, but she did not oppose the campaign for stricter abortion legislation. To the contrary, her newspaper editorialized in 1868 in favor of legislation to restrict abortiofacient drugs and remedies, on grounds that "Restellism has long found in those broths of Beelzebub, its securest hiding place." The Revolution 1(5):2 (Feb. 5, 1868).

D. Early Feminist Opposition to Abortion Was Joined to Condemnation of Male Sexual Irresponsibility and Coercion, and the Lack of Economic and Social Support for Pregnant Women Abandoned by the Fathers of Their Children.

1. The early feminists called for prevention of the circumstances giving rise to abortion. Their concern for the lives of unborn children did not preclude, but was interwoven with, a broader concern for women with crisis pregnancies, children already born, and their mothers. Susan B. Anthony expressed the holistic nature of the feminist attitude in an 1869 editorial:

> Much as I deplore the horrible crime of child-murder, earnestly as I desire its suppression, I cannot believe . . . that such a law [prohibiting abortion] would have the desired effect. It seems to me to be the only moving off the top of the noxious weed, while the root remains. We want *prevention*, not

[11] Susan B. Anthony was the proprietor of this weekly publication, and Elizabeth Cady Stanton was the editor.

> merely punishment. We must reach the root of the evil, and destroy it.
>
> To my certain knowledge this crime is not confined to those whose love of ease, amusement and fashionable life leads them to desire immunity from the cares of children: but is practiced by those whose inmost souls revolt from the dreadful deed, and in whose hearts the maternal feeling is pure and undying. What, then has driven these women to the desperation necessary to force them to commit such a deed? This question being answered, I believe, we shall have such an insight into the matter as to be able to talk more clearly of a remedy.

Anthony, *Marriage and Maternity*, The Revolution, 4(1): 4 (July 8, 1869) (emphasis in original).

Dr. Stockham demonstrated that many of the circumstances which lead to abortion today were also operative in the nineteenth century.

> What are some of the incentives to produce abortion? An unmarried woman, seduced under false representation by a man who feels no responsibility for his own offspring, suffers alone all the shame and contumely of the act, and is tempted to cause miscarriage to shield her good name.
>
> Married women who fear that maternity will interfere with their pleasures, are guilty of forcibly curtailing embryonic life. Others again, who are poor or burdened with care or grief, or have licentious or drunken husbands, shrink from adding to an already overburdened existence.

Stockham, *supra*, at 247. She continued that "even the most aggravating circumstances cannot atone for the crime" of abortion, and emphasized that "*[t]he remedy is in the prevention of pregnancy, not in producing abortion.*" *Id.* at 250.

2. The early feminists condemned social attitudes, especially sexual double standards, which contributed to an increasing incidence of abortion. General social attitudes likewise played a role in the promotion and toler-

ance of abortion. Sarah F. Norton, itinerant lecturer and author, noted that "[s]ociety has come to believe it an impertinence in children to be born at all. . . . "[T]he single fact that child murderers practice their profession without let or hindrance, and open infant butcheries unquestioned, establishing themselves with an impunity that is not allowed to the slaugherers of cattle is, of itself, sufficient to prove that society makes a demand which they alone can supply." *Tragedy, Social and Domestic*, Woodhull & Claflin's Weekly, Nov. 19, 1870.

At the root of this demand were social attitudes regarding sexual behavior, illegitimacy, and the nature of preganancy itself. The sexual "double standard"—which permitted men to behave in an irresponsible fashion, but punished the women being victimized—was universally condemned. Dr. Stockham described how the double standard led directly to abortion:

> [T]he girls who have lost their virtue under promise of marriage [] are most deserving of sympathy and commiseration, though none receive less. [E]ven those professing to be the followers of the loving Christ, often have so little leniency, so little of the Father's love in their hearts, that they hug their Christian robes to their bodies, lest they be contaminated by the polluting touch of the victim. . . . . And if she can conceal the evidence of her guilt, she may hope by honest endeavor to retrieve her good name, and thus is tempted to produce an abortion. *Two wrongs canont make a right. . .*

Stocklam, *supra* at 247-248.

Linked to the double standard was the stigma of illegetimacy. In a particularly compelling account from Woodhull and Claffin's Weekly, Laura Cuppy Smith described how she and her daughter rejected abortion when the daughter became pregnant out of wedlock: a courageous decision not to acquiesce to societal pressure.

> Friends said—well-meaning friends—"There is a way, hide this thing from sight, send her on a jour-

> ney, destroy this evidence of youthful folly, all may yet be well." I was proud; I loved a good position in society for myself, how much more for my children; my daughter in her youth and grace and beauty, how could I bear that the world should point its finger at her and utter its mocking laugh? How could I save her? Should I accept this "one way" suggested? If I wavered—and might as I wrestled in that garden of Gethsemane—God knows it was but a second. I made my resolve. I said, "This child of youth and love! This child of my child has a right to live, and *shall* live—has a right to love, and shall have that also; has a mission to its mother and shall perform it . . . . No dark secret shall dog my child's footsteps through life; she shall enter no man's home with a lie on her lips.

Smith, *How One Woman Entered the Ranks of Social Reform; Or, A Mother's Story*, Woodhull and Claflin's Weekly, March 1, 1873.

3. The early feminists believed that the liberation of women from positions of social inequality and sexual dominance would lead to increased protection for the unborn. Since the early feminists viewed abortion as a by-product of sexual domination by men, and the unequal position of women in society, it is not surprising that they saw equality between the sexes as a necessary prerequisite to the eradication of abortion, and an end to sexual double standards, as addressing the root cause of abortion, and eradicating it.

Elizabeth Cady Stanton clearly argued that the liberation of women was needed to stop the killing of children before and after birth.

> We are living to-day under a dynasty of force; the masculine element is everywhere overpowering the feminine, and crushing women and children alike beneath its feet. Let woman assert herself in all her native purity, dignity, and strength, and end this wholesale suffering and murder of helpless children. With centuries of degradation, we have so little of

> true womanhood, that the world has but the faintest glimmering of what a woman is or should be.

The Revolution 1(4): 57-58 (Jan. 29, 1968).

Sarah Norton echoed this sentiment, referring specifically to the sexual double standard that permitted men to satisfy their desires with impunity, but left women with the choice between being despised for bearing an unplanned-for child, or denying that child his or her right to live.

> Perhaps there will come a time when the man who wantonly kills a woman and her babe will be loathed and scorned as deeply as the woman is now loathed and scorned who becomes his dupe; when the sympathy of society will be with the victim rather than the victimizer; when an unmarried mother will not be despised because of her motherhood; when unchastity in men will be placed on an equality with unchastitity in women, and when the right of the unborn to be born will not be denied or interfered with . . .

Norton, *Tragedy, Social and Domestic*, Woodhull and Claflin's Weekly, Nov. 19, 1870.

Feminist criticism of the double standard, however, did not derive from, or result in, an attitude of sexual prudishness. Victoria Woodhull, who was jailed by anti-vice crusader Anthony Comstock for allegedly circulating obscene materials through the mails, outspokenly rejected Victorian sexual attitudes.

> Where there is purity in the heart, it cannot be obscene to consider the natural functions of any part of the body, whether male or female. I am aware that this is a terrible truth to tell the world, but it is a truth the world needs to be told.

V. Woodhull, "The Garden of Eden," in *The Human Body the Temple of God*, 38 (1890). Elizabeth Cady Stanton critized Walt Whitman for writing "as if the female must be forced to the creative act, apparently ignorant of the great natural fact that a healthy woman has as much passion as a man, that she needs nothing stronger than

the law of attraction to draw her to the male." *Elizabeth Cady Stanton as Revealed in Her Letters, Diary, and Reminiscenses*, Vol. II, 114 (T. Stanton and H. Blatch, ed., 1922). The feminists were rebelling against a situation in which men were entitled to satisfy their own passions, without giving in return. They objected, not to sexual expression itself, but to its degradation through male-female inequality.

4. In condemning "forced maternity," the early feminists did not support abortion, but rather, opposed the cultural and sexual mores which compelled many women to become pregnant against their will. Such early feminists as Stockham, Anthony, and Elizabeth Cady Stanton were profoundly distressed by the phenomenon of "forced maternity." Stanton, for example, in an editorial condemning abortion as "child murder" and "infanticide," stated that "[t]here must be a remedy for such a crying evil as this. But where shall it be found, at least begin, if not in the complete enfranchisement and elevation of woman? Forced maternity, not out of legal marriage but within it, must lie at the bottom of a vast proportion of such revolting outrages against the laws of nature and our common humanity." Stanton, *Child Murder*, The Revolution 1 (10): 146-47 (March 12, 1868).

"Forced maternity" did not mean restricted access to abortion. To the early feminists, a woman was a mother once she became pregnant, and the fact that the pregnancy was unwanted in no way justified the "revolting outrage" of abortion. They also believed, however, that women had the right, within marriage, to refrain from sexual intercourse when they did not consider themselves able to bear or rear a child. Abortion resulted from the *denial* of the woman's "right to herself," as Matilda Gage termed it, not from the exercise of that right. Gage, in response to the editorial of Stanton quoted above, further illustrated this point. "The crime of abortion," she wrote,

> is not one in which the guilt lies solely or chiefly with the woman. As a child brings more care, so also, it brings more joy to the mother's heart.

> Husbands do not consult with their wives upon this subject of deepest and most vital interest, do not look at the increase of family in physiological, moral, or spiritual light, but almost solely from a money standpoint. It costs. Tens of thousands of husbands and fathers throughout this land are opposed to large families. And yet so deeply implanted is the sin of self-gratification, that consequences are not considered while selfish desires control the heart.

Gage, *Is Woman Her Own?*, The Revolution 1(14): 215-16 (April 9, 1868). Gage considered abortion to be a crime both in the moral and the juridical sense.

> I hesitate not to assert that most of this crime of "child murder," "abortion," "infanticide," lies at the door of the male sex.
>
> Many a woman has laughed a silent, derisive laugh at the decisions of eminent medical and legal authorities, in cases of crimes committed against her as a woman. Never, until she sits as a juror at such trials, will or can just decisions be rendered.

Id.

III. THE HOLDING THAT ACTIVITY IN OPPOSITION TO ABORTION IS ACTIONABLE AS INVIDIOUS DISCRIMINATION UNDER SECTION 1985(3) IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THAT SECTION.

A. Section 1985(3) Requires an Intent to Deprive a Fundamental Right of Citizenship.

The Civil Rights Act of 1871 [12] was intended by Congress to foster participation in democratic society by shielding citizens from violence and intimidation. It was not intended to be used as a sword to stifle dissent and silence political opponents. Section 2 of the Act, codified as 42 U.S.C. § 1985(3), was passed as a response to widespread acts of terror, committed with impunity,[13]

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[12] 17 Stat. 13 (1871); codified at 42 U.S.C. § 1985(3).

[13] Cong. Globe, 42nd Cong., 1st Sess., 322 (Remarks of Rep. Stoughton) ("not a single offender brought to justice"); *Id.* at 368 (Rep. Sheldon); *Id.* at 428 (Rep. Beatty).

aimed at creating an environment hostile to equality in the democratic and judicial process.[14] While some members narrowly defined denial of fundamental rights of citizenship,[15] at most, § 1985(3) was designed to protect those rights safeguarding participation in a free and democratic society.[16]

Rep. Cook, who drafted § 1985(3), echoed the sentiments of the majority in asserting that Congress should protect those political rights and legal rights, such as voting and access to courts,[17] and punish acts designed to wrongfully deny those rights.[18] This was consistent

[14] Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U.L.J. 331, 349, 368 (1967); Globe at 395 (Rep. Rainey) (the animus of the Ku Klux is to remove existing state structures, to be rebuilt by them); Globe at 441-51 (Rep. Butler) (intent of the Klan was to drive the Republican Party and such ideals out of the South); Globe at 702 (Sen. Edmunds) ("systematic plan to kill or drive out white Republicans and drive Negro Republicans from the polls").

[15] Globe at 333-34 (Rep. Hoar) ("there must be a clear case of denial of government . . . the denial to large classes of the people of the blessings of republican government altogether").

[16] Originally, it was offered to replace a measure protecting voting rights. Cong. Globe 42nd Cong., 1st Sess. App. 68 (1871) (Rep. Shellabarger); *see also, Ku Klux Klan Act*, 11 St. Louis U.L.J. at 331-32; Globe at 340 (Rep. Kelley) (protects equal political participation) Globe at 425-27 (Rep. McKee); Globe at 428 (Rep. Beatty); Globe at 436-40 (Rep. Cobb); Globe at 457 (Rep. Coburn); Globe at 483-85 (Rep. Wilson); Globe at 157-59, 165-66 (Rep. Shellabarger); Globe at App. 251-52 (Sen. Morton); Globe at 656 (Sen. Nye); Globe at 686-90 (Sen. Schurz).

[17] Such rights also include: right to advocate ideas and candidates for office; right of access to federal courts; the integrity of the state courts, safeguarding witnesses, jury members, and officers of the court; and the right to appeal. Globe at 486 (Rep. Cook). *See* also, Globe at 383 (Rep. Hawley) (voting and holding office are protected rights of citizenship).

[18] Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U.Chi. L.Rev. 402 (1979); Globe at 333-35 (Rep. Hoar) (manipulation of courts and jury, interfering with right to vote); Globe at 375 (Rep. Lowe) (driving person from the

with Rep. Bingham's idea of "equal and exact justice" under the Fourteenth Amendment, encompassing, not the right to be free of all discrimination, but instead, merely a right, common to all citizens, to judicial enforcement of fundamental rights.[19] Rep. Shellabarger, the sponsor of H.R. 320, explained that it covered only those acts aimed at denying rights that are

> essential franchises of national citizenship. . . . In this regard the bill goes nowhere beyond the protection of rights *clearly and unquestionably* fundamental, and belonging to citizenship in every free Government as an element and attribute of that national citizenship which he carries with him wherever he goes throughout the world.[20]

Agreeing that Congress should protect "those great fundamental rights on which all true freedom rests," [21] Rep. Garfield, who was most instrumental in amending § 1985(3) to its present form, insisted that such fundamental rights were limited.[22] Others concurred, intend-

state, terrorizing justice system); Globe at 459 (Rep. Coburn) (manipulating authorities to avoid arrest, indictment, and prosecution); Globe at 481 (Rep. Wilson) (intimidation of state authorities); Globe at 514 (Rep. Poland) (section covers intent to "step in and clog justice" and "interfere and prevent the execution of that State law"); Globe at 516-17 (Rep. Shellabarger); Globe at 567, 580 (Sen. Edmunds) (acts designed to "defeat the regular and due administration of justice" and to "obstruct State authorities").

[19] Maltz, *Reconstruction Without Revolution*, 24 Houston L.Rev. 221, 269 (1987).

[20] Globe at App. 69 (remarks of Rep. Shellabarger) (emphasis added); *see also*, Globe at 332 (Rep. Hoar) ("fundamental, essential rights of human nature itself"); Globe at 334 (Rep. Hoar) (rights that are "fundamental and essential to citizenship," and are "the blessings of republican government"); Globe at 382 (Rep. Shellabarger) ("rights of national citizenship"); Globe at 459 (Rep. Coburn) (fruits of the "essence" of a "republican form of government).

[21] Globe at App. 153 (remarks of Rep. Garfield).

[22] Globe at App. 152 (Rep. Garfield) (interpretations of fundamental privileges and immunities that include "protection by the

ing the measure to protect only those essential, inalienable rights of national citizenship.[23]

There is no evidence that Congress intended to protect rights which did not reflect its central concern for the rights of political participation of newly-enfranchised citizens. "Seeking abortion" cannot be termed as essential right of national citizenship, since it is not a right indispensable to a free society.[24] Senator Duke noted during floor debate on the Ku Klux Klan Act that procured abortion was itself an illegal act.[25] Thus, to conspire privately to peaceably block the doors to an abortion clinic no more deprives women of the essential rights of national citizenship to equally participate in the political or judicial process, than a sit-in at a segregated lunch counter deprives potential restaurant patrons of their citizenship rights.

B. Section 1985(3) Should Not be Used to Resolve the Political and Cultural Dispute Over Whether Opposition to Abortion Constitutes Discrimination Against Women.

The broader dispute over abortion is manifested by a division in feminist theory over whether "women can [ ]ever achieve the fulfillment of feminist goals in a society permissive toward abortion." Callahan, *Abortion & the Sexual Agenda*, Commonweal 232, 232 (April 25,

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Government, the enjoyment of life and liberty, with the right to . . . pursue and obtain happiness and safety," go far beyond the intent of the Framers); *Ku Klux Klan Act*, 11 St. Louis U.L.J. at 347.

[23] Globe at 395 (remarks of Rep. Rainey); Globe at 428 (Rep. Beatty). Nearly every Republican denied that Congress had power to punish conspiracies motivated solely to deprive the victim of his rights. *Ku Klux Klan Act*, 11 St. Louis U.L.J. at 377.

[24] *See generally*, M. Glendon, *Abortion and Divorce in Western Law* (1988).

[25] Globe at App. 91. Sen. Duke, an opponent of the act, made his comments in the course of identifying the range of criminal activity that took place in the district of one of the chief Radical Republican sponsors of the act in the House.

1986). Respondent N.O.W. holds that abortion is essential to their notion of the feminist agenda. Many others, including, in fact, a majority of American women, hold that a more encompassing and truly feminist vision of justice demands protection for the unborn child. *Id.* at 234. A contrast is sometimes drawn in feminist theory between "cultural" feminists, who emphasize the importance of women in the creation and nurturing of human life, and "radical" feminists, who identify this very role as the source of oppression of women.[26] These contrary views of feminism offer different conclusions on whether abortion is necessary for the social and political emancipation of women, and whether opposition to abortion is, *per se*, discrimination against women. Bayles, *Feminism and Abortion*, The Atlantic Monthly 83, 85 (April 1990).

Respondents would have the Court resolve this debate under the rubric of federal civil rights law, by declaring that the alleged activities of the petitioners constitute invidious class-based discrimination against women. This is the essence of the holdings of the court of appeals below, and of the Second Circuit. Neither court has offered a plausible rationale for its conclusion on the discriminatory animus issue; the only reasonable conclusion is that both courts unquestioningly embraced respondent National Organization for Women's extreme political viewpoint on the relationship between abortion and women's rights, to the exclusion of all others. A reasonably close analysis of the question establishes (1) that feminist theory is itself divided on the connection between abortion and gender discrimination; and (2) that opposition to abortion is fundamentally grounded in concern for the life of the unborn child, not animus toward women as a class. Clearly, this Court should reject the respondents' attempt to put the weight of the nation's civil rights laws behind the dubious proposition that anti-abortion senti-

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[26] *See* West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 13 (1989); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs: Journal of Women in Culture and Society 635, 636, n.4 (1983).

ment and activity is inherently discriminatory against women.

The configuration of this case further reveals that this is a dispute between opposing sides in a political, legal, and social conflict; not a genuine dispute over the ability of the Commonwealth of Virginia to ensure the equal protection of the laws to its citizens. The respondents do not include any individual woman seeking an abortion at any of the respondent clinics. Nor did the respondents, in the hearing before the District Court, present testimony from any member of the "class" purportedly at risk of deprivation of equal protection of the law from the petitioners' activity. Rather, they relied chiefly on testimony from persons employed either to perform abortions, or to advocate for legalized abortion. Furthermore, there was not a shred of evidence that respondents could not obtain adequate injunctive relief under Virginia law, or in the Virginia courts.

Simply put, the respondents here support the act of abortion, and its legalization. The petitioners oppose the *act* of abortion—not the class of women as a whole, or the sub-class of women seeking to obtain abortions. The common law of trespass, the equitable power of injunction, and the police power of criminal law are amply available to redress any alleged injury arising out of the dispute between these parties. This case has nothing to do with gender-based discrimination, invidious or otherwise, and it is a flagrant abuse of civil rights law to suggest that it does.

CONCLUSION

The decision of the Court of Appeals should be reversed.

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APPENDIX

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IN THE

Supreme Court of the United States

October Term, 1990

JAYNE BRAY, *et al.*,

Petitioners,

v.

ALEXANDRIA WOMEN'S CLINIC, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. AND THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS

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STATEMENT OF THE ISSUE DEALT WITH HEREIN

Does Section 1985(3) protect a "right to abortion" against violation by private parties which is alleged to afford an alternate ground for affirming the court below?

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BRIEF AMICI CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. AND THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS

INTEREST OF AMICI[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various lawful political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the primary promoters of laws restricting abortion on demand to only those instances in which mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within the limits set by these decisions and have sought, through lawful means, those changes in the law which would allow full legal protection for the unborn. The National Right to Life Committee, Inc. seeks to advance its interests by addressing the legal issues herein.

The Christian Life Commission of The Southern Baptist Convention is the agency of the Convention charged by the

[1] This brief is filed with permission of all the parties. Letters of permission have been filed with the Clerk of this Court.

Convention with assisting Southern Baptists in understanding the moral demands of the Christian faith and helping Southern Baptists apply Christian principles to moral and social problems. The Southern Baptist Convention, the nation's largest Protestant denomination, with 38,000 congregations and 15 million church members, has assigned the Christian Life Commission of the Southern Baptist Convention the specific task of addressing issues such as abortion.

SUMMARY OF ARGUMENT

The Respondents have claimed that the "right to abortion," like the right to travel, is protected by Section 1985(3). However, this Court has declared that the "right to abortion," whatever its appropriate constitutional weight, is found within the Fourteenth Amendment, and thereby is protected only against state action. The Respondents admit that no state action is present in this case.

Respondents argue that the Ninth Amendment provides alternate constitutional grounds for recognizing a "right to abortion" which would protect women seeking abortions from even private interferences with abortion. However, the Ninth Amendment's retained rights cannot be a new source of fundamental constitutional rights. This is true because (1) the principle purpose of the Ninth Amendment was to avoid an implied extension of federal power due to the ratification of the Bill of Rights; (2) retained rights cannot prevail over the delegated powers of the federal government; and (3) the federal courts are not empowered to enforce retained rights against the states.

This Court has determined that Section 1985 is not a source of substantive rights, it only provides a remedy for the violation of fundamental constitutional rights found elsewhere. This Court distinguishes between fundamental rights and mere liberty interests. It is clear from the language of the Act itself and this Court's precedent in *Griffin v. Breckenridge* that Section 1985(3) only protects fundamental constitutional rights, not liberty interests. Section 1985(3) cannot be invoked

to protect mere personal or property interests without the violation of fundamental constitutional rights.

This Court's decisions in *Webster*, *Hodgson*, and *Ohio* reveal that the right to abortion is no longer considered by the majority of this Court to be a fundamental right. Therefore, abortion is not of sufficient constitutional weight to merit protection under Section 1985(3). This Court's determination that abortion is a mere liberty interest is consistent with this Court's tests for determining which rights are properly deemed fundamental.

For these reasons this Court should find that Section 1985(3) does not protect abortion from interference by private parties.

ARGUMENT

I. The Alleged Violation of the "Right to Abortion" by Petitioners Was Claimed Below as an Alternate Ground for Affirming the Court Below.

The Respondents claimed before the Fourth Circuit that "by blockading clinics, defendants prevented women from exercising their constitutional right to choose to have abortions. This right, like the right to travel, is protected by Section 1985(3). The [sic] point affords an alternative ground for affirming the finding of a Section 1985(3) violation." Brief for Appellees and Cross-Appellants at 19, *National Organization for Women v. Operation Rescue* (4th Cir.) (Nos. 90-2606, 90-2607 & 90-2651). This *amicus curiae* brief seeks to address this issue, in the event that Respondents make this claim before this Court.

II. The "Right to Abortion" is Only Protected Against State Action, Which is Not Alleged Herein.

This Court has declared that the "right to abortion," whatever its appropriate constitutional weight, is found within the Fourteenth Amendment and, thereby, is protected only

against state action. It is not, as Respondents argue, a Ninth Amendment right against intereference by private persons.

A. *The Right to Abortion, under* Roe v. Wade, *is a Fourteenth Amendment Right Against State Action.*

The right to abortion, under *Roe v. Wade*, 410 U.S. 113 (1973), is a Fourteenth Amendment right against government interference with the abortion decision, not a right against all interference. In this case the Respondents admit that there is no state action. However, state action is a necessary element of any claim for violation of the abortion right. This can be demonstrated in three ways.

First, since *Roe v. Wade*, the right to abortion has always been held to be a right arising under the Fourteenth Amendment. In *Roe* this Court declared the Texas abortion statute to be a violation of the right of privacy "founded in the Fourteenth Amendment's concept of personal liberty." *Id.* at 153. In *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), this Court explicitly left *Roe*'s foundation in the Fourteenth Amendment undisturbed:

> This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, [410 U.S.] at 164, and we leave it undisturbed.

109 S. Ct. at 3058.

Second, the whole thrust of the *Roe* decision was to free women from government interference in the abortion decision, at least during the first trimester: "This right of privacy . . . is broad enough to encompass a woman's decision whether to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent." 410 U.S. at 153. The trend toward limitation of state action in regulating abortion is the major theme of *Roe*'s progeny. *See, e.g., Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri v.*

Danforth, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *H.L. v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 420 (1983); and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

Third, the abortion funding decisions held that Roe was not implicated, therefore, the states need only show a rational basis for limiting funds for abortions. In *Maher v. Roe*, 432 U.S. 464, indigent women brought suit challenging a Connecticut regulation prohibiting the funding of abortions that were not medically necessary. Although failure to fund abortions for indigent women would limit their access to abortion, this Court held that the "Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." *Id.* at 469.

Similarly, in *Harris v. McRae*, 448 U.S. 1302 (1980), this Court upheld the constitutional validity of the Hyde Amendment which severely limits use of federal funds to reimburse the cost of abortions under the medicaid program. The Court held:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution.

Id. at 317-18.

From these decisions, it may be concluded that the abortion right created in *Roe* arises under the Fourteenth Amendment and that any violation of such right occurs only as a result of state action which constitutes an unwarranted interference with that right. Without state action, there is no violation of the

Fourteenth Amendment. Without a violation of the Fourteenth Amendment, there is no basis for a claim of violation of an abortion right and, therefore, no Section 1985(3) action by the Respondents.

B. *The Right to Abortion is Not a Ninth Amendment Right Against Interference by Private Parties.*

The Ninth Amendment declares: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In the court below, the Respondents argued that the Ninth Amendment contains a right to abortion that applies against purely private actors. Brief for Appellees and Cross-Appellants at 21-23, *National Organization for Women v. Operation Rescue* (4th Cir.) (Nos. 90-2606, 90-2607 & 90-2651). Your *amicus* addresses this argument in response to its anticipation of a similar argument to this Court.

The Ninth Amendment has been cited by this Court and others in support of the concept that there are other protected rights not enumerated in the Constitution. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) ("[T]here are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Id.* at 488); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) ("[T]he Constitution's draftsment . . . were concerned that some important rights might be thought disparaged because not specifically guaranteed." *Id.* at 579); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (alluding to the possibility that the right of privacy may be a right reserved to the people by the Ninth Amendment); *Buckley v. Valeo*, 424 U.S. 1, 59 n.67, 84 n.113 (1976) (per curiam) (campaign spending limits may implicate Ninth Amendment rights); and *Lubin v. Panish*, 415 U.S. 709, 721 n. (1974) (Douglas, J., concurring) (right to vote in state elections).

This *amicus* has no quarrel with the view that there are other protected rights not enumerated in the Constitution. *See*

generally Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duquesne L. Rev. 271 (1990). However, this *amicus* does dispute the concept that the Ninth Amendment protects unenumerated rights that conflict with the delegated powers of the federal government or that the Ninth Amendment limits the people's authority to constitute state governments.[2]

The natural meaning of the Ninth Amendment is that the Constitution's enumeration of certain rights does not deny, disparage, expand, or restrict the rights, unenumerated in the Constitution, that are retained by the people under state law. The words, history, and purpose of the Ninth Amendment demonstrate that it is not a "bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion." Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1, 2 (1980) (characterizing Justice Goldberg's concurrence in *Griswold*). It is, instead, a rule of construction that confirms that the federal government is one of limited powers, and that rights not delegated by the people to the federal government are not to be denied or disparaged simply because they are not enumerated in the Constitution. By definition, then, the "rights retained" do not overlap or trump granted federal powers, nor do they override state powers.

1. The Principal Purpose of the Ninth Amendment Was to Avoid an Implied Extension of Federal Power.

As sent to the states for ratification, the Constitution did not include a general bill of rights. This omission provoked considerable opposition to the ratification of the Constitution. *See* G. Wood, *The Creation of the American Republic 1776-1787* 536-43 (1969); E. Dumbauld, *The Bill of Rights and What It Means*

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[2] This section of this Brief draws heavily from the *Report to the Attorney General, Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause*, U.S. Department of Justice, Sept. 25, 1987, at 15-27, which is an excellent discussion of the purpose and intent of the Ninth Amendment.

Today 10-33 (1957). Two principal arguments were made in opposition to the addition of a bill of rights. First, it was argued that a bill of rights was unnecessary because the federal government was a government of limited, delegated powers. James Wilson explained in a widely republished speech that every power

> which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: for it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.

Speech of James Wilson (October 6, 1787), 13 *The Documentary History of the Constitution* 339-40 (1981).

Second, it was argued that the addition of a bill of rights would imply that all other rights and powers had been delegated to the federal government. Such an implication was inconsistent with the concept of a government of limited powers and therefore was to be avoided. James Wilson expressed it this way:

> [I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an *enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

2 *Elliot's Debates* 436-37 (1836) (emphasis in original). *See also The Federalist, No. 84*, at 579-80 (Hamilton) (referring to a bill of rights as "dangerous" for this reason).

In order to secure its ratification by the states, the federalists agreed to amend the Constitution to include a bill of rights. James Madison proposed the amendments that eventually became the Bill of Rights. He defended his proposal which became the Ninth Amendment:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution . . . .

12 *Papers of James Madison* at 206. In this way Madison confirmed his understanding that his proposal operated as a restriction on the implied extension of federal powers.

2. The Retained Rights Do Not Prevail Over Powers Delegated to the Federal Government.

In his statement on the House floor introducing the resolutions that, with revisions, became the Bill of Rights, Madison spoke of the role of the courts in enforcing rights.

> It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated; but does it not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be

> an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly *stipulated* for in the constitution by the declaration of rights.

12 *Papers of James Madison* 206-07 (emphasis added).

This contemporaneous explanation contemplates that courts will serve as an "impenetrable bulwark" against (1) unconstitutional expansions of power and (2) infringement of "expressly stipulated" rights in the Constitution. There is no suggestion that courts are to create and enforce exceptions to granted powers in favor of retained rights. Of course, if, as the traditional interpretation maintains, the retained rights are those not delegated to the federal government, then, to the extent courts are an "impenetrable bulwark" against every "assumption of power" beyond those granted the government, no other specific protection of retained rights is required.

The text, history, and purpose of the Ninth Amendment all demonstrate that retained rights do not prevail over delegated powers. Thus, the Respondents' argument that a right to abortion resides within the Ninth Amendment misinterprets the nature of the Ninth Amendment. This amendment has been traditionally understood to contradict the concept that the people have abandoned all rights not specifically granted to them in the Bill of Rights. Without the Ninth Amendment there was a concern that the Bill of Rights might be misinterpreted to be an implied extension of federal power.

For example, Justice Story explained that the Ninth Amendment "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." J. Story, *Commentaries on the Constitution of the United States* § 1905, at 624-25 (4th ed. 1873).

Edward Dumbauld, in his book, *The Bill of Rights and What It Means Today*, stated the purpose of the Ninth Amendment:

> The Ninth Amendment was not intended to add anything to the meaning of the remaining articles in the Constitution. It was simply a technical proviso inserted to forestall the possibility of misinterpretation of the rest of the document . . . . It is destitute of substantive effect.

E. Dumbauld, *supra* 63-64.

Since this is true, then the retained rights referred to in the Ninth Amendment are simply those rights that remain after subtracting the powers delegated to the federal government from the original sovereignty of the people. Thus, retained rights are subordinate to the delegated powers of the federal government and cannot prevail over those delegated powers when they conflict.

Justice Reed stated this in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947): "[W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth . . . Amendment[], the inquiry must be directed toward the granted power under which the action of the Union was taken. If the granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth . . . Amendment[], must fail." *Id.* at 95-96.

The purpose of the Ninth Amendment was not to expand the powers of the courts in determining the nature of these retained rights, the purpose was to limit the federal government to the powers expressly granted in the Constitution. Justice Black, in his dissent in *Griswold v. Connecticut*, 381 U.S. at 520, stated: "as every student of history knows," the Ninth "Amendment was passed, not to broaden the powers of this Court or any other department of 'the general government' but . . . to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication."

Activists argue that the focus on rights, rather than powers, in the Ninth Amendment and in Madison's statement introducing his draft (quoted above), implies that the amendment means something more than that federal powers are limited.

Professor Ely, for example, after quoting Madison's explanation, contends "that even here Madison, though he may have linked them in a way that seems unnatural today, made both [points] that he wished to forestall both the implication of unexpressed powers and the disparagement of unenumerated rights. What is more important is that just as the Tenth Amendment clearly expresses the former point, the Ninth Amendment clearly expresses the latter." J. Ely, *Democracy and Distrust* 36 (1980) (emphasis in original). The point appears to be that unless retained rights trump granted powers, the Ninth Amendment is superfluous.

This argument depends upon the significance assigned to the use of the words "powers" in the Tenth Amendment and "rights retained" in the Ninth Amendment. The change in focus from "powers" to "rights retained" was the cause of some opposition to ratification. Hardin Burnley reported in a letter to Madison that what became the Ninth and Tenth Amendments were initially rejected by the Virginia Assembly. Governor Randolph led the opposition, arguing that it was not possible to determine which rights were retained by the people.

> His principal objection was pointed against the word *retained* . . . and his a[r]gument if I understood it was applied in this manner, that as the rights declared in the [first eight amendments] were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st. & 17th. amendments proposed by Virginia [which were predecessors to the Ninth and Tenth Amendments], that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.

Letter from Hardin Burnley to James Madison (November 28, 1789), 12 *Papers of James Madison* 456 (original spelling retained) (emphasis in original).

In a letter to George Washington, Madison responded to Randolph's argument, contending that it raised, in essence, a distinction without a difference.

> The difficulty [stated] against the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is still a greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.

Letter from James Madison to George Washington (December 5, 1789), 12 *Papers of James Madison* 459. Madison thus confirmed his understanding that, notwithstanding the reference to "rights" instead of "powers," the Ninth Amendment continued to operate as a restriction on the implied extension of federal powers.

Under Madison's and traditional interpretation, the Ninth Amendment is a companion to the Tenth Amendment and is not redundant. The Tenth Amendment affirms that powers not delegated to the federal government are reserved to the states and the people; in other words, it is a statement of who *possesses* undelegated powers. The Ninth Amendment, on the other hand, concerns the *location* of the line between delegated powers and retained rights, and commands that the line not be moved by virtue of the enumeration of some rights.

Some argue that the "rights retained by the people" refer to "natural rights," theories of which were popular among some at the time of the ratifications of the Constitution and the Bill of Rights, and that those unwritten "natural rights" trump powers. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 152 (1928); B. Patterson, *The Forgotten Ninth Amendment* 19-22 (1955); Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814, 816 (1966).

The Constitution, however, nowhere incorporates natural law or provides that natural, fundamental, or any sort of higher law is superior to it. To the contrary, as previously noted, article VI provides that the "Constitution," not some higher law principles, "shall be the supreme Law of the Land."

Furthermore, the "rights retained" by the people under the Ninth Amendment may be delegated to or waived as against a state. Thus, whether the right has been retained by the people as against a *state* depends upon the allocation of governmental powers and individual rights under that state's constitutional law. One would not look to the U.S. Constitution or the federal courts for their origin, description, or enforcement. Certainly, the rights retained by the people could be waived, limited or defined by state law and constitutions pursuant to the actions of the people or their constitutionally empowered legislative representatives. To assert, as the Respondents do, that the retained rights are now incorporated by the Fourteenth Amendment, including a right to abortion, and that federal courts are now under an obligation to protect such retained rights as against the states, transforms the Ninth Amendment into a restriction on the people's right to create state governments and to empower those states with such authority as they may constitutionally delegate to them.

Russell Caplan reaches a similar conclusion by focusing on the state-law basis of rights at the time of the Constitution's ratification. He argues that the "rights retained" in the Ninth Amendment refer only to state-based rights, that those state-based rights do not trump federal powers because of the Supremacy Clause, and that it is logically impossible to "incorporate" the Ninth Amendment through the Fourteenth against the states, because the amendment was intended to protect, not circumscribe, state-based rights and circumstances. Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223, 260-62 (1983).

Therefore, the Ninth Amendment is not substantive in nature. It does not create rights, neither is it a source from which new rights may be created. It is simply a rule of construction, no more, no less. It cannot be the source of a right to abortion that is enforceable against interference by private actors. Thus it cannot be the basis for a constitutional right which activates Section 1985(3).

III. Section 1985 Provides a Remedy Only for the Violation of Fundamental Rights, Not Liberty Interests.

A. *This Court Distinguishes Between Fundamental Rights and Liberty Interests.*

The terms "fundamental right" and "liberty interest" are used in contra-distinction in this Court's plurality opinion in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989):

> The experience of the Court in applying *Roe v. Wade* in later cases . . . suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a *'fundamental right'* to abortion, as the Court described it in *Akron*, . . . a limited fundamental constitutional right,' which Justice BLACKMUN's dissent today treats *Roe* as having established, . . . or a *liberty interest* protected by the Due Process Clause, which we believe it to be.

Id. at 3058 (emphasis added) (citations omitted).

A clear explanation of how these two terms are used by the new Court majority is found in the opinions of Justice White and Chief Justice Rehnquist. Justice White, together with now-Chief Justice Rehnquist, were the original dissenters in *Roe v. Wade* and *Doe v. Bolton*, but are now in the Court's majority on abortion. *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting); *Roe* and *Bolton*, 410 U.S. at 221 (White, J., dissenting to both *Roe* and *Bolton*); *Doe*, 410 U.S. at 223 (Rehnquist, J., dissenting).

In *Roe*, now-Chief Justice Rehnquist explained the meaning of substantive due process liberty interests:

> [T]he "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that

> liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a *rational relation* to a valid state objective.

Roe, 410 U.S. at 172-73 (Rehnquist, J., dissenting) (emphasis added).

Justice White's dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), discussed the distinction between a fundamental right and a liberty interest:

> The Due Process Clause of the Fourteenth Amendment, which forbids the deprivation of "life, liberty, or property without due process of law," has been read by a majority of the Court to be broad enough to provide substantive protection against state infringement of a broad range of individual interests.
>
> * * *
>
> In most instances, the substantive protection afforded the liberty or property of an individual by the Fourteenth Amendment is extremely limited: State action impinging on individual interests need only be rational to survive scrutiny under the Due Process Clause, and the determination of rationality is to be made with a heavy dose of deference to the policy choices of the legislature. Only fundamental' rights are entitled to the added protection provided by strict judicial scrutiny of legislation that impinges upon them.

Id. at 789 (citation omitted) (White, J., dissenting).

It was in this context that Justice White made his sometimes misconstrued comment regarding an abortion liberty:

> I can certainly agree with the proposition — which I deem indisputable — that a woman's ability to choose an abortion is a species of "liberty" that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so "fundamental" that

> restrictions upon it call into play anything more than the most minimal judicial scrutiny.

Id. at 790.

Justice White's comment, that "abortion is a species of 'liberty,'" does not mean that he recognizes special constitutional protection for abortion. His view is stated clearly in *Thornburgh:*

> *Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never — not in 1787, 1791, 1868, or at any time since done any such thing. I would return the issue to the people by overruling *Roe v. Wade*.

Id. at 796-97.

In sum, there is a clear distinction between "liberty interests" and "fundamental rights" under the liberty clause of the Fourteenth Amendment. As discussed below, only fundamental rights are protected under 1985(3).

B. *Section 1985 Only Protects Fundamental Constitutional Rights, Not Liberty Interests.*

Section 1985 provides no substantive rights itself; it merely provides a remedy for the violation of the fundamental constitutional rights. It does not protect mere liberty interests.

The wording of Section 1985(3) itself indicates that only fundamental constitutional rights are protected:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the *equal protection of the laws*, or of *equal privileges and immunities under the laws;* or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the *equal protection of the laws;* or if

two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to *vote*, from giving his *support or advocacy* in a legal manner, toward or in favor of the *election* of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any *right or privilege of a citizen of the United States*, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C.A. § 1985(3) (1871) (emphasis added)[3]

The rights specifically named in the statute are all fundamental constitutional rights, i.e., equal protection of the laws, equal privileges and immunities under the laws, the right to vote and to support or campaign for political candidates. In order to make sure that no fundamental right would be excluded, the statute specifically protects "any right or privilege of a citizen of the United States." The rights Congress sought to protect were those rights that were necessary to free participation in a political democracy. Those were the rights most in jeopardy in the period of Civil War Era Reconstruction.

The seminal case of *Griffin v. Breckenridge*, 403 U.S. 88 (1971) established this interpretation. *Griffin* involved the violent acts of Ku Klux Klan members in attempting to discourage black persons, whom they mistakenly thought were civil rights workers, from entering and working within the state of Mississippi. In *Griffin* this Court determined for the first time that the Ku Klux Klan Act, now encoded at 42 U.S.C.A. § 1985(3), extended to private conspiracies and that the Act was constitutional as applied under the Thirteenth Amendment and the constitutional power to protect the right of interstate travel. However, the Court did not see fit to include every possible violation committed by two or more persons within a state. Justice Stewart wrote:

> *That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others.* For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, "that Congress has a right to punish an assault and battery when committed by two or more persons within a State." [Cong. Globe, 42d Cong., 1st Sess. 485 (1871).]

Id. at 101-02 (emphasis added).

In reaching its conclusion, this Court identified "two constitutional sources" (*id.* at 107) relied upon to support a cause of action under Section 1985(3):

> We can only conclude that Congress was wholly within its powers under § 2 of the *Thirteenth Amendment* in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.
>
> * * *
>
> *Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental inter-*

[3] Section 1985(3) "as first enacted authorized both criminal and civil actions against those who have conspired to deprive others of federally guaranteed rights. Before the 19th century ended, however, the Court found the criminal provisions of the statute unconstitutional because they exceeded the scope of congressional power, [citations omitted], and the provisions thus invalidated were later formally repealed by Congress. The civil action provided by the Act remained, but for many years was rarely, if ever, invoked." *Great American Federal S. & L. Ass'n v. Novotny*, 442 U.S. 366, 370-71 (1979).

> *ference.* [Citations omitted.] The "right to pass freely from State to State" has been explicitly recognized as "among *the rights and privileges of National citizenship.*" *Twining v. New Jersey,* 211 U.S. 78, 97 [1908]. That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation.

403 U.S. at 105-06 (emphasis added).

If the plaintiffs' physical injuries alone in *Griffin* were sufficient to invoke the protections of Section 1985(3), why did this Court rest its holding squarely on the Thirteenth Amendment and the fundamental constitutional right of interstate travel? It would not have done so unless the existence of a fundamental right was necessary to its holding.

This interpretation is also supported by Justice Powell's concurring opinion in *Great American Federal S. & L. Ass'n v. Novotny,* 442 U.S. 366, 378 (1979) (Powell, J., concurring). In *Novotny,* an action was brought by a former male employee, who alleged that his support for female employees was the cause of his discharge, contending that he had been injured as a result of a conspiracy to deprive him of equal protection of and equal privileges and immunities under the laws. *Id.* at 366. This Court held that the statutory right created by Title VII of the Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a),[4] could not be the basis for a cause of action under Section 1985(3). The Court's rationale was that only this holding could preserve the effectiveness of the administrative remedies provided for in Title VII.

Justice Powell concurred with the result reached in the majority opinion but felt that it failed to give proper guidance to the federal courts as to when Section 1985(3) may be invoked:

> I agree with the opinion of the Court as far as it goes, and I join it. I also agree with the views expressed by Mr.

[4] "Congress enacted Title VII of the Civil Rights Act of 1964 to assure equality of employment opportunities by eliminating those practices and devises that discriminate on the basis of race, color religion, sex or national

(footnote continued)

> Justice STEVENS' concurring opinion. I write separately because it seems to me that the Court's decision affords unnecessarily little guidance to courts in the federal system.

Id. at 378.

Justice Powell's reason for siding with the majority was that the reach of Section 1985(3) "is limited to conspiracies to violate *those fundamental rights derived from the Constitution.*" *Id.* (emphasis added). In support of this view he cites the holding and rationale of *Griffin.* He notes the "two constitutional sources" cited in *Griffin,* and quotes *Griffin*'s holding that the right of interstate travel, "like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation." Then he concludes stating:

> By contrast, this Court has never held that the right to any particular private employment is a "right of national citizenship," or derives from any other right created by the Constitution. Indeed, even Congress, in the exercise of its powers under the Commerce Clause of the Constitution, has accorded less than full protection to private employees. . . . Nor does the Constitution create any right to be free of gender-based discrimination perpetuated solely through private action.
>
> The rationale of *Griffin* accords with the purpose, history, and common understanding of this Civil War Era statute. *Rather than leave federal courts in any doubt as to the scope of actions under § 1985(3), I would explicitly reaffirm the constitutional basis of* Griffin.

Id. at 380-81 (emphasis added). Thus Justice Powell concludes that the precedent of this Court in *Griffin* requires the violation

Footnote 4 continued

origin. . . . To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974).

of a fundamental constitutional right before Section 1985(3) may be properly invoked.

Furthermore, the violations of Section 1985(3) that have been recognized by the federal courts have involved fundamental constitutional rights. *See, e.g., Griffin*, 403 U.S. 88 (interstate travel); *Skadegaard v. Farrell*, 578 F.Supp. 1209 (D.N.J. 1984) (sexual harassment under 14th Amendment); *Hunt v. Weatherbee*, 626 F.Supp. 1097 (D.Mass. 1986) (sexual harassment); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F.Supp. 165 (D.Or. 1988) (interstate travel); and *New York State National Organization for Women v. Terry*, 704 F.Supp. 1247 (S.D.N.Y. 1989), *aff'd as modified*, 886 F.2d 1339 (2nd Cir. 1989) (interstate travel).

For these reasons, the rights protected by Section 1985(3) are limited to fundamental constitutional rights, not mere liberty interests. Section 1985(3) cannot be invoked to protect mere personal or property interests without the violation of fundamental constitutional rights.

IV. Under This Court's Jurisprudence the Right to Abortion is Only a Liberty Interest, Not a Fundamental Right.

The right to abortion is no longer considered by this Court to be a fundamental right. This is evident from this Court's plurality and concurring opinions in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990).

In *Webster*, this Court upheld Missouri statutes (1) banning the use of public employees and facilities for the performance of abortion, except to save the life of the mother, 109 S. Ct. at 3053, and (2) requiring viability testing before abortions could be performed where the abortionist has reason to believe a woman is carrying an unborn child of twenty or more weeks gestational age. *Id.* at 3056. The Court also determined that federal courts could not consider (and reversed the lower

court's decision to do so) the preamble to the Missouri law, which made a legislative finding that individual human life begins at conception. *Id.* at 3050.

The pivotal change wrought by *Webster* in abortion jurisprudence was evident in the express analyses employed by a new majority of Justices on the Court. Compiling these analyses into a single analysis reveals that, after *Webster*, (a) "the unduly burdensome test ha[d] become the de facto standard of review in abortion jurisprudence," (b) there [was] no longer a "general, fundamental right to abortion," (c) "to the extent any abortion right [would be] recognized, the trimester scheme is defunct and states have compelling interests in unborn life and maternal health throughout pregnancy," and (d) "to the extent any fundamental right to abortion [would be] recognized, abortion regulations need no longer be narrowly tailored." *See* Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157, 159, 161, 162, 164 (1989). The key element of these changes is the fact that the abortion right has been demoted to a mere liberty interest. *Webster*, 109 S. Ct. at 3058 (plurality opinion of Rehnquist, C.J., and White and Kennedy, JJ.) (abortion characterized as "a *liberty interest* protected by the Due Process Clause, which we believe it to be" (emphasis added); 109 S. Ct. at 3064 (Scalia, J., concurring in part and concurring in the judgment) (Justice Scalia wrote, "I . . . would [overrule *Roe*] more explicitly," thereby recognizing abortion as a liberty interest rather than a fundamental right.).[5]

Thus, the significance of *Webster* goes beyond the statutes which the Court upheld. A majority of this Court has now abandoned the key underpinning of the decision in *Roe v. Wade*, 410 U.S. 113 (1973)that there is a general "fundamental right to abortion." By so doing, the new majority has *sub silentio* overruled *Roe v. Wade*. *See* Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157.

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[5] Justice O'Connor, likewise, did not employ strict scrutiny, for her analysis does not treat abortion as a general fundamental right.

The profound change in abortion jurisprudence indicated by *Webster* is further apparent in this Court's latest decisions on abortion. These decisions, *Hodgson v. Minnesota*, 110 S. Ct. 2926, and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, confirm the radical change in abortion jurisprudence indicated by the Court's decision in *Webster*, 109 S. Ct. 3040.

In *Hodgson* and *Ohio*, five of the nine justices again treated abortion as a mere "liberty interest" rather than a "fundamental right." This is evident from the fact that these five justices required only a "rational basis" for the state's abortion statutes rather than a higher standard, as would be required if abortion were a fundamental right. *Ohio*, 110 S. Ct. at 2977, 2983-84 (plurality opinion of Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ.) ("The Statute in issue here is a rational way to further those ends."); *Ohio*, 110 S. Ct. at 2981 (The Court, including Justice O'Connor, referred to minors' abortion interest as a "liberty interest."); *Hodgson*, 110 S. Ct. at 2944 (Stevens, J., joined by O'Connor, J.) (the statute at issue "would reasonably further the legitimate state interest"); id. at 2945 (the Court) (the statute at issue "does not reasonably further any legitimate state interest"); id. at 2949 (O'Connor, J., concurring in part and concurring in the judgment in part) ("It has been my understanding in this area that [i]f the particular regulation does not "unduly burde[n]" the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose. It is with that understanding that I agree with Justice Stevens' statement that the statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests.'" (citations omitted)).

The new Court majority, evident in *Webster*, *Hodgson*, and *Ohio*, therefore, treats abortion as only a liberty interest. Since abortion is no longer a fundamental right, it is no longer of sufficient weight to merit protection under Section 1985(3).

V. This Court Has *Properly Determined* That the Right to Abortion is a Mere Liberty Interest.

This Court has been criticized for its failure to justify its treatment of abortion as a liberty interest, not a fundamental right. Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83, 83-84 (1989). However, pursuant to this Court's precedent for such determinations, the right to abortion is properly characterized as a liberty interest.[6]

A. *This Court Applies an Historical Test to Determine Which Liberty Interests Rise to the Level of Being a Fundamental Right.*

To determine which liberty interests rise to the level of fundamental rights, this Court has employed two tests to assist in determining which rights are properly deemed "fundamental." As discussed below, the second test has come to be the one relied upon by the Court.

The first test asks whether an asserted fundamental right is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The second test asks whether a failure to recognize the asserted liberty interest as fundamental would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). These tests for fundamentality have been qualified in more recent cases to clarify precisely which history is relevant: an asserted fundamental right must be "necessary to an *Anglo-American* regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (emphasis added), or "deeply rooted in *this Nation's* history and tradition," *Moore v.*

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[6] Furthermore, the doctrine of *stare decisis* does not prevent this Court from overruling *Roe*'s holding that abortion is a fundamental right. *See generally* Bopp, Coleson & Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule* Roe v. Wade? 1 Seton Hall Const. L. J. 55, 84-107 (1990).

City of East Cleveland, 431 U.S. 494, 503 (1977) (emphasis added).

This Court has relied increasingly on the "history and tradition" test as being more concrete and reliable. This is expressly stated in the case of *Duncan v. Louisiana*, 391 U.S. at 149-50 n.14, which the Court has described as "rejecting the *Palko* [implicit-in-the-concept-of-ordered-liberty] formula as the basis for deciding what procedural protections are required of a State, in favor of a historical approach based on the Anglo-American legal tradition." *Moore v. City of East Cleveland*, 431 U.S. at 504 n.12. In *Moore*, the Court noted that "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from *Palko v. Connecticut*." *Id.*[7]

The predominant reliance on the historical test is evident in the recent decisions of this Court involving asserted fundamental rights. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986) (The Court noted the fact that sodomy was historically a crime and held that the Constitution did not protect homosexual sodomy as a fundamental right). In applying the historical test, two factors must be kept in mind. The first factor is summarized in Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (a discussion often cited in the Court's discussions of the test for fundamentality), namely that the substantive content of the due process clause consists of "the balance which our Nation . . . has struck between . . . liberty and the demands of organized society." Id. at 542. It "is the balance struck by this county, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." *Id.*

[7] It is noteworthy that Justice White expressed reservations about the historical test in *Moore*, arguing that it "suggests a far too expansive charter for this Court and a far less meaningful and less confining guiding principle than [the implicit-in-ordered-liberty test] for serious substantive due process review. *Moore*, 431 U.S. at 549 (White, J., dissenting). However, by the time of *Bowers v. Hardwick*, 478 U.S. 186 (1986), he had adopted the majority analysis, employing it in the opinion he authored for the majority.

The second factor which must be considered is the way in which a proposed fundamental right is formulated prior to being submitted to the historical test for fundamentality. Members of the Court have debated the level of specificity at which a proposed fundamental right must be formulated before being tested by the historical test for fundamentality. For example, in the homosexual sodomy case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), the majority rejected a number of broad formulations of the proposed fundamental right, such as the right to do what one wishes "in the privacy of the home," *id.* at 195, or the right to engage in "voluntary sexual conduct between consenting adults," *id.*[8] Rather, the *Bowers* majority formulated the proposed fundamental right in a narrower, concrete, fact-sensitive manner, e.g., the right to engage in "consensual homosexual sodomy." *Id.* at 188 n.2.[9]

What this means for abortion jurisprudence is that the new majority on this Court has rejected the free-wheeling test of *Roe v. Wade*, which asks whether a right of privacy is "broad enough to encompass" a right to abortion, Roe, 410 U.S. at 153. Under the rejected *Roe* approach, this Court could simply determine that there is broad, undefined right of privacy and conclude that it is sufficiently broad to encompass abortion. Under such an approach, the Court could have as easily found a constitutional right to infanticide. Instead, the Court will now ask whether a right to abortion on demand is deeply rooted in this Nation's history and tradition.

[8] The *Bowers* dissenters employed ten different board and abstract formulations, such as the "right to be let alone," which could encompass nearly anything. *Bowers*, 478 U.S. at 199, 204, 205, 206, 208 211, 217.

[9] This is confirmed in the recent case of *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989). In *Michael H.*, the plurality formulated the proposed fundamental right as "the power of the natural father to assert paternal rights over a child born into a woman's existing marriage with another man." *Id.* at 2343 (plurality opinion). In so doing, the *Michael H.* plurality rejected the broad formulation by the dissenters which would ask whether "parenthood is an interest that historically has received our attention and protection." *Id.* at 2350 (Brennan, J., dissenting).

B. *Because Abortion Fails the Historical Test for Fundamentality, This Court's Majority Has Demoted the Former Abortion Right to a Liberty Interest, So That Legislation Restricting It Need Only Have a "Rational Basis."*

When the issue is framed as whether abortion on demand is deeply rooted in the history and tradition of our Nation, it is readily apparent that it was not. Therefore, there could properly be no fundamental right to abortion.

An examination of the history of legal restrictions on abortions reveals that abortion has been legally restricted throughout the history of our Republic until *Roe v. Wade* overturned the laws of the States. *Roe*, 410 U.S. 113. The history of abortion restrictions in Anglo-American common law and statutory law is discussed at great length by Professor Joseph Dellapenna. See Dellapenna, Brief of the American Academy of Medical Ethics, as *Amici Curiae*, *Minnesota v. Hodgson*, 110 S. Ct. 2926 (1990) (No. 88-1309); and Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979).

The history of abortion regulation in this country has been set forth concisely by now-Chief Justice Rehnquist in his dissent to *Roe v. Wade*, 410 U.S. at 174-77 (Rehnquist, J., dissenting) (listing the ubiquitous abortion statutes in the States). Justice Rehnquist summed up the implications of history for determining the fundamentality of a right to abortion: "The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 174.

This theme was revisited in oral arguments in the *Webster* case, when Frank Susman, attorney for Planned Parenthood, declared to this Court that an abortion right is "deeply rooted in this nation's history and tradition." *Transcript of Oral Arguments Before the Court on Abortion Case*, *N.Y. Times*, April 27, 1989, at B13, col. 2. Susman endeavored to establish this by defining the proposed right broadly as a right of procreative choice, thereby seeking to inextricably link abortion and procreation. *See* Bopp, *The Elusive Abortion Right*, The Nat'l L.J., June 12, 1989, at 13, col. 1 (discussing this flawed analysis at length and Justice Scalia's rejection of the contraception-abortion link). This effort was rejected by Chief Justice Rehnquist who refocused the issue on the narrow, concrete issue of abortion in his response: "[S]urely abortion was regulated by the states in the 19th century and in the 20th century?" He continued, "If you say there is a deeply rooted tradition in this area, that suggests that there had been no legislative intervention to me. . . . [T]hat simply is not the fact." *Transcript of Oral Arguments Before the Court on Abortion Case*, N.Y. Times, April 27, 1989, at B13, col. 3.

From these comments and from the historical facts, it is evident that there is no fundamental constitutional right to abortion, using the now-controlling historical test, and the majority on this Court no longer recognizes a fundamental right to abortion. This is evident from this Court's recent cases, in which it has abandoned the analysis required by *Roe v. Wade*.

CONCLUSION

The "right to abortion," whatever its constitutional dimensions, only arises under the Fourteenth Amendment. It therefore is only protected against state action which has not been alleged herein. Further, Section 1985(3) has traditionally provided a remedy only for violations of fundamental rights, not mere liberty interests. Under this Court's jurisprudence the right to abortion is only a liberty interest, not a fundamental right. This Court's characterization of the right as a liberty interest is consistent with its own precedent in making such determinations.

For the above reasons, this Court should find that Section 1985(3) does not protect a "right to abortion" against violation by private parties.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1990

JAYNE BRAY, et al.,

Petitioners,

v.

ALEXANDRIA WOMEN'S CLINIC, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF AMERICAN VICTIMS OF ABORTION IN SUPPORT OF PETITIONERS

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STATEMENT OF THE ISSUE DEALT WITH HEREIN

Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

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INTEREST OF THE AMICUS[1]

American Victims of Abortion (AVA) is a national organization of persons whose lives have been adversely affected by abortions, either their own abortion or that of a family member. The objective of AVA is to provide a forum for these individuals to educate legislatures and the public about the tragic consequences of abortion for some women. AVA is composed primarily of women. As such an organization, AVA is uniquely qualified to address the issue herein of whether restrictions on abortion—either public or private—deny women the equal protection of the laws. AVA believes that restrictions on abortion are not motivated by a discriminatory attitude toward women and do not deprive women of the equal protection of the laws. By this Brief, your amicus curiae seeks to provide to the Court its unique perspective on matters relating to abortion.

SUMMARY OF THE ARGUMENT

This Court has held that parties seeking relief under 42 U.S.C. § 1985(3) must demonstrate a conspiracy to deprive them of equal protection motivated by some class-based, invidiously discriminatory animus. Respondents claim that § 1985(3) protects gender-based classifications and that a subclass of a gender-based class, "women seeking abortions," is also a gender-based class. Whether or not § 1985(3) protects gender-based classes, it does not extend to a sub-class of women seeking abortions. This is evident from the analysis of this Court in *Geduldig v. Aiello*, which determined that refusal to extend certain disability benefits to disabilities resulting from abortion was a distinction based on pregnancy, not on gender. Applying this logic, it is clear that women seeking abortions are distinguished by desire to have an abortion, not gender. Congress has also revealed its intent not to equate

[1] This brief is filed with permission of all the parties. Letters of permission have been filed with the Clerk of this Court.

witholding of benefits relating to abortion with sex-discrimination in the enactment of special amendments to Title VII and Title IX. If the present Congress does not make this equation, it is apparent that Congress did not intend to make this equation in 1871 when § 1985(3) was enacted (and abortion was prohibited by state criminal laws). Finally, general principles of equal protection established by this Court, drawn from Fourteenth Amendment analysis, reveal that women seeking an abortion do not constitute a gender-based class. Attempting to make them so would so distort equal protection analysis as to make it unrecognizable.

ARGUMENT

I. 42 United States Code § 1985(3) Requires Proof of Invidious Discriminatory Animus Against a Protected Class.

This Court has held that parties seeking relief under 42 U.S.C. § 1985(3) must allege and prove a conspiracy to deprive them of "*equal* protection" motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 834-35 (1983) (quoting *Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971)) (emphasis in original).

Respondents claim that § 1985(3) protects not only racial classes from class-based animus (the statute was originally enacted to protect black citizens and their supporters), but also classes distinguished by gender, specifically the class of women. Respondents further claim that within the broad gender-based class of women is a sub-class which applies to them, i.e., women seeking abortions. Thus, they claim protection for this sub-class under § 1985(3).

Whether or not gender-based animus is appropriately included within § 1985(3) — a matter on which your amicus takes no position — a class of women seeking abortions does not qualify for protection under § 1985(3).

II. Congressional Intent, Both at the Time of Passage of 42 U.S.C. § 1985(3) and at the Present, Has Not Been to Make "Women Seeking Abortion" a Suspect Class for Equal Protection Analysis.

A. *The Original Intent of Congress Was to Protect Black Citizens, Their Supporters, and Possibly Others, But Only Where Class-Based Animus Exists.*

The original intent of Congress in enacting 42 U.S.C. § 1985(3) was discussed by this Court in *Scott:*

> [I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than the animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. . . . [We] still withh[o]ld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern — combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments.

Scott, 463 U.S. at 836-37. Thus, the original intent of Congress was to prevent groups such as the Ku Klux Klan from conspiring to deprive black citizens of the equal protection of the laws. It did not intend to create "a federal remedy for all tortious, conspiratorial interferences with the rights of others.'" *Scott*, 463 U.S. at 834 (quoting *Griffin*, 403 U.S. at 101). In *Scott*, this Court left open the question whether § 1985(3) extends to classes other than race, 463 U.S. at 836-37, but it is clear that, at a minimum, there must be some "class-based" animus in order for § 1985(3) to apply.

However, this Court, in *Scott*, carefully avoided the expansion of the classes protected by § 1985(3), a message which the Tenth Circuit understood: "'from *Scott* we get a signal that the classes covered by § 1985 should not be extended beyond those

already expressly provided by the Court.'" *Brown v. Reardon* 770 F.2d 896, 907 (10th Cir. 1985) (quoting *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983), cert. *denied*, 465 U.S. 1103 (1984). The Seventh Circuit has warned against the expansion of such classes:

> It is the obligation of the subordinate jurisdictions to divine the direction of the Court, and the considered dictum in *Scott* cannot be ignored. The question of the classes protected under the provision is one of statutory construction. As construed in *Griffin* and *Scott*, § 1985(3) was enacted to fulfill a highly specific purpose and to meet an unusual condition in the Reconstruction era. Since its decision in *Griffin*, the Court has not expressly provided a remedy to a group or class other than blacks. The import of *Griffin* and *Scott* is that the legislative history of § 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class-based animus against "Negroes and their supporters."

Grimes v. Smith, 776 F.2d 1359, 1366 (7th Cir. 1985).

The expansion of the scope of § 1985(3) to encompass a class of women seeking abortions has been rejected by the Fifth Circuit and the federal District Court for the Central District of California. *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170-72 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990). However, the lower courts, in the case at bar, found that women seeking abortions do constitute a class protected under § 1985(3). *National Organization of Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989); *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

By doing so, the lower courts herein have not only recognized gender as a protectable class under § 1985(3) but also a subclass of women seeking abortions. However, a class of women seeking abortions is distinguished not by its gender, but by

class members' desire to have abortions. More logically, the classes into which this distinction divides people are (1) persons seeking abortions and (2) persons not seeking abortions. While the former class of persons seeking abortions would include women, the latter class would also include women, along with men. Logically, the former class could also include men, such as abortionists seeking freedom to perform abortions and males seeking to procure abortions for a pregnant acquaintance (or seeking to assist a women seeking an abortion). The distinctive factor is not gender, but the practice of abortion. Thus, this is not a gender-based class. As stated by one district court:

> [I]f the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender.

National Abortion Federation v. Operation Rescue, 721 F. Supp. at 1171.

This Court has already resolved the logic which controls this case in its opinion in *Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Geduldig*, this Court held that a state disability insurance program excluding from its coverage disabilities resulting from pregnancy did not deny women of the equal protection of the law. *Id.* at 492. This Court determined that the distinction in the insurance program was not based on gender, but on pregnancy: "The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.* at 496 n.20. Applying this same logic to the case at bar demonstrates that there can be no gender-based animus against women seeking abortion.

That Congress would not have intended § 1985(3) to reach actions relating to abortion—either by the state or private individuals—is manifested by the congressional focus on Reconstruction era problems. It is also manifested by the fact that, during the period when § 1985(3) was enacted, the most

intense period of legislative activity restricting abortion was underway.[2] As shall be discussed *infra*, neither do general principles of equal protection, established by the Constitution and protected against conspiratorial deprivation by this statute, include protection of a class of women seeking abortions.

B. Recent Expressions of Congressional Intent Show No Provision of Statutory Protection for a Class of Women Seeking Abortions.

Current statutory expressions indicate that the present Congress does not consider the restriction of abortion to be a form of invidious discrimination in violation of the notion of equal protection. This is clear in two provisions.

1. Title VII, The Pregnancy Discrimination Act

Title VII of the Civil Rights Act of 1964, 78 Stat. 241, as amended, 42 U.S.C. §2000-2(a), provides remedies for sex-based discrimination in employment (as well as discrimination on the basis of race, color, religion, or national origin). It prohibits sex-based classifications relating to the terms and conditions of employment, hiring, firing, and any other decision which would adversely affect an employee.

In the 1976 case of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court considered whether, under Title VII, a

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[2] About 1857, the American Medical Association led a "physicians' crusade" to enact protective abortion legislation effective from the time of conception, a crusade made urgent by the discovery of cell biology and the understanding that individual human life began at conception. J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 147-70 (1978); *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary*, 97th Cong., 1st Sess. 474 (Statement of Victor Rosenblum, Professor of Law and Political Science, Northwestern Univ.). Twenty-six of the thirty-six states had statutory prohibitions (abortion had long been illegal at common law) against most abortions by the end of the Civil War, as did six of the ten territories by 1865. Thus, in 1871, when § 1985(3) was enacted, federal legislators would not have intended to include within its protections a class of women seeking abortions barred under criminal statutes.

corporate disability compensation plan which excluded disabilities stemming from pregnancy discriminated against female employees because of their sex. This Court determined that the principles of *Geduldig*, *supra*, borrowed from constitutional equal protection analysis governed the case. Thus, this Court held that, because the class distinction was based on pregnancy and not on gender, Title VII's prohibition on gender-based discrimination was not violated. *Id.* at 136.

Subsequently, Congress effectively overruled that decision, *for purposes of Title VII only*, by enacting the Pregnancy Discrimination Act. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983). The Pregnancy Discrimination Act, 42 U.S.C. §2000(k), provides that — under Title VII — discrimination

> "because of sex" or "on the basis of sex" include[s] . . . [discrimination] because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs,as other persons not so affected but similar in their ability or inability to work . . . .

Thus, for purposes of Title VII, Congress statutorily determined that it would be gender-based discrimination to classify persons on the basis of pregnancy. Of course, this Congressional determination by statute for purposes of Title VII does nothing to alter the underlying principle established by this Court in *Geduldig* and *Gilbert*, that discrimination on the basis of pregnancy is not discrimination on the basis of sex, apart from a statute declaring the contrary for purposes of Title VII. There is nothing in Congress' action which alters the inherent logic, recognized by this Court, that distinctions made on the basis of pregnancy are not sex-based distinctions.

However, *even in Title VII*, where Congress statutorily extended the gender-based class to include pregnancy-related classifications, Congress specifically approved of a classification based on abortion. In enacting the Pregnancy Discrimina-

tion Act, Congress declared that:

> This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion . . . .

Id. Thus, Congress itself has refused to consider unequal treatment of the class of women seeking abortions as the automatic equivalent of sex discrimination.

In the case of *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls*, 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991), this Court considered discrimination in employment and hiring under the Title VII provisions. Johnson Controls, Inc. had been challenged because of its policy of not allowing women of childbearing capacity to work in lead-exposure areas (based on a fetal-protection policy). This Court concluded that because the class of persons barred from such employment was based on the capacity for pregnancy, it violated the Pregnancy Discrimination Act, stating:

> Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the Pregnancy Discrimination Act means what it says. It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family and her family than her economic role. *Congress has left this choice to the woman as hers to make.*

Id. at 4215 (emphasis added).

Two key facts must be noted about *Johnson Controls*. First, the concept of an equal protection class of women of childbearing capacity is purely one of statutory creation for purposes of Title VII. Second, even where Congress has provided a statutory basis — under Title VII — for a class of women of childbearing capacity and has barred discrimination on the

basis of sex, it has exempted from the definition of sex discrimination any restrictions on abortion. Thus, neither Title VII nor *Johnson Controls* provides any support for the notion that §1985(3) should be extended to encompass a gender-based subclass of women seeking abortions.

2. Title IX, Sex Discrimination in Education

Similarly, when Congress enacted the "Grove City Bill" (The Civil Rights Restoration Act of 1987), amending Title IX of Pub. L. 92-318, 86 Stat. 373, it expressed its belief that classifications on the basis of abortion do not constitute sex discrimination. Title IX prohibits discrimination in education on the basis of sex. Specifically, Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal assistance.

20 U.S.C. §1681.

Pursuant to the purported authority of Title IX, regulations were issued to establish standards that a covered institution must meet to avoid a finding of sex discrimination. The regulations provided, in part, that covered institutions:

> shall treat . . . termination of pregnancy . . . in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such [institution] administers, operates, offers or participates in with respect to students. . . .

34 C.F.R. §106.40 and 45 C.F.R. §86.40.

Under this administrative interpretation of Title IX, withholding of abortion-related benefits was equated with sex discrimination. However, at the first opportunity which Congress had to amend Title IX, Congress enacted the Danforth Amendment to Title IX, specifically rejecting such an interpretation of Title IX. Removing this equation of withholding abortion bene-

fits with sex-discrimination was the focus of Congressional intent behind the Danforth Amendment. This is evident from the opening of Congressional debate, 134 Cong. Rec. S 160 (daily ed. Jan. 27, 1988), to its conclusion. 134 Cong. Rec. S 236 (daily ed. Jan. 28, 1988). The Danforth Amendment provided:

> Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.

20 U.S.C. §1688. Under this statute, an educational institution could refuse to perform, pay for, or provide any benefit (e.g., leave time) relating to abortions without such a refusal being considered gender-based discrimination.

From these provisions, it is clear that the current Congress does not view abortion-discrimination as equivalent to sex-discrimination. It would be preposterous, then, to imagine that in 1871 the Congress which enacted §1985(3) intended to protect a class of women seeking abortion, which was banned by the criminal statutes of the time. Therefore, §1985(3) does not extend protection to women seeking abortion. Congress intended no such thing in 1871, nor does it now.

III. "Women Seeking Abortion" is Not A Suspect Class For Purposes of the Equal Protection Analysis Underlying 42 U.S.C. §1985(3).

Underlying the question of whether women seeking an abortion may constitute a class within the protection of §1985(3) is the issue of what groups have the special characteristics which comprise a suspect class for equal protection purposes. This debate has occurred primarily in the field of constitutional law, under the Equal Protection Clause of the fourteenth amendment. U.S. Const. amend. XIV, §1. While Congress has modified the equal protection principles employed by this Court to analyze statutes prohibiting sex-based discrimination (while declaring that abortion-based distinctions do not equal sex discrimination), this modification affects only these statutes. Thus, apart from these statutes where Congress has specifically decided otherwise, this Court should follow its determination in *Gilbert* "that the Fourteenth Amendment standard of discrimination is coterminous with that applicable" to a statute applying equal protection standards. *Gilbert*, 429 U.S. at 154 n.6. The body of law this Court has developed with regard to constitutional equal protection, where not statutorily altered, is the most valuable source of equal protection analysis for the present issue of whether women seeking an abortion are a class appropriate for protection under §1985(3).

A. *The Original Understanding of the Equal Protection Doctrine.*

Both the history of section 1 of the fourteenth amendment and the scope of its originally intended enforcement are somewhat ambiguous. U.S. Const. amend. XIV, §1. This Court first construed the fourteenth amendment in *The Slaughter-House Cases*, 83 U.S. 57 (1873), only five years after the amendment had been ratified (and only two years after the enactment of §1985(3)). As this Court noted, "[f]ortunately that history [of the fourteenth amendment] is fresh within the memory of us all." *Id.* at 68. The *Slaughter-House* Court found that the "pervading purpose" of the amendment was "the freedom of the slave race, the security and the firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 71.

More specifically, this Court stated that "[t]he existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by . . . [the equal protection] clause." *Id.* at 81. This Court concluded with a forecast: "[w]e doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Id.*

Seven years later in *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court again had occasion to review the history of

the fourteenth amendment. The *Strauder* Court found that the fourteenth amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States." *Id.* at 306. This Court, therefore, struck down a state statute which restricted jury duty to whites, but indicated that the restriction limiting jury duty to male citizens over the age of twenty-one would be upheld. This Court held that the state could not discriminate on the basis of race, but "[i]t may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment was ever intended to prohibit this." *Id.* at 310. In 1953, this Court looked again to the history of the fourteenth amendment to resolve the issue of school segregation. *Brown v. Board of Education*, 347 U.S. 483 (1953). Time seemed to have obscured the original meaning of the fourteenth amendment, and the *Brown* court dismissed the historical evidence as "inconclusive." *Id.* at 489.

Shortly after Brown was handed down, Alexander Bickel made his own detailed inquiry into the circumstances surrounding the adoption of the fourteenth amendment. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955). By looking at both the impact of the amendment at the time of its ratification, and considerations of its future effects, Professor Bickel concluded that "section 1 . . . deals not only with racial discrimination, but also with discrimination whether or not based on color." *Id.* at 59-60. Professor Bickel based this finding on the fact that there was an earlier alternative to section 1 that would have applied specifically to race alone that was rejected in committee. *See id.* at 59. Bickel also believed that the drafters of the fourteenth amendment "emulated the technique of the original framers, who were . . . responsible to an electorate only partly receptive to the fullness of their principles, and who similarly avoided the explicit grant of some powers without foreclosing their future

assumption." *Id.* at 62. In short, Bickel argued that the language of section 1 of the fourteenth amendment is purposefully broad enough to encompass "further strides toward the ideal of equality" that are consistent with "the trend in public opinion." *Id.* at 63-64.

Judge Robert Bork would not take such a broad view of the original intentions of the framers of the fourteenth amendment. Bork claims that "[i]t is clear that the ratifiers . . . did not think they were treating women as an oppressed class similar in legal disadvantages to the newly freed slaves," R. Bork, *The Tempting of America: The Political Seduction of the Law* 329 (1990), and therefore it was never contemplated that "racial and sexual groups needed special protection to the same degree." *Id.* at 66 n.*. Regardless of whose analysis one accepts, both would probably agree that the thirty-ninth Congress would not have passed an amendment that would have given women immediate social and legal equality with men. *See* Bickel, *supra*, at 63-64; and *see* Bork, *supra*, at 329. Regardless, Bork's analysis seems to reflect the approach that the Court has ultimately taken with respect to racial and gender classifications.

B. *Present Equal Protection Analysis*

This Court has traditionally subjected the classifications used in economic and social welfare legislation to a rational basis test. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). For legislation to pass this test, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1919). This Court's inquiry into the purpose of the classification generally does not go very far. "Where . . . there are plausible reasons for [the legislature's] action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *United States Railroad Retirement Bd. v.*

Fritz, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). The rational basis test ensures against "arbitrary and unreasonable government," *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1948) (Jackson, J. concurring.), while allowing the legislature maximum latitude in drawing necessary statutory classifications.

Legislation that classifies on the basis of race or national origin, however, has historically been treated with less deference by the Court. *See, e.g., Strauder*, 100 U.S. 303; *and Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." *Id.* at 216. As further developed by this Court, the strict scrutiny test requires that a classification be narrowly tailored to further a compelling government interest. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). This test has come to be applied not only to statutes that classify on the basis of race and national origin, but also those classifications that infringe upon the exercise of a fundamental right by a particular group. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Shapiro v. Thompson*, 394 U.S. 618 (1969). This two-pronged use of the equal protection analysis owes its origin to Justice Stone's famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).[3]

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[3] There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition,

(footnote continued)

Recently this Court has employed a test more rigorous than the rational basis test, yet less searching than strict scrutiny. Intermediate scrutiny requires that the legislative classification be substantially related to an important government interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982). This standard has been applied in the context of discrimination based on gender, *see id.*, alienage, *see, e.g., Plyler v. Doe*, 457 U.S. 202 (1982); *Graham v. Richardson*, 403 U.S. 365 (1971), and illegitimacy. *See, e.g., Matthews v. Lucas*, 427 U.S. 495 (1976); *Trimble v. Gordon*, 430 U.S. 762 (1977). As can be seen from this brief discussion, this Court's approach to the two-pronged equal protection analysis presently consists of three levels of scrutiny. Legislation that draws classifications on the basis of race or national origin, or that impinges on a fundamental right, is subject to strict scrutiny and is almost always found unconstitutional. Legislation classifying on the basis of gender, alienage, or illegitimacy is scrutinized at an intermediate level, and all other statutory distinctions must be rationally related to a legitimate state purpose.

C. *Gender Discrimination*

The application of the intermediate standard of review in the context of gender discrimination is of fairly recent origin. In *Reed v. Reed*, 404 U.S. 71 (1971), this Court used the rational basis test to strike down a state statute that favored men over women in determining who would administer the estate of one who dies intestate. *Id.* at 76 (citing *Royster*, 253 U.S. at 412, 415). The Reed court found that "[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violate[d] the Equal Protection Clause."

Footnote 3 continued

> which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. at 152 n.4.

Id. at 77 (citation omitted). Conversely, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), Justice Brennan, writing for a plurality of four, stated that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." *Id.* at 682. The *Frontiero* Court found unconstitutional a federal statute that provided larger military housing allowances and medical benefits to the spouses of male personnel, than to the spouses of female personnel. *Id.* at 678-679.

After canvassing both of these approaches to equal protection analysis, this Court settled on an intermediate standard of review in *Craig v. Boren*. 429 U.S. 190. Craig dealt with a state statute that prohibited the sale of 3.2% beer to males under 21 and females under 18 years of age. *Id.* at 192 n.1. Justice Brennan, again writing for the Court, stated that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 197. Under this standard the statute was found violative of equal protection. *Id.* at 210. More recently, this Court applied this same standard of review to allow a male to attend an all-female, state-supported nursing school. *See Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

Some gender discrimination cases, however, have not invalidated the statutory distinctions drawn between men and women. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), this Court was required to review a promotion policy of the United States Navy which allowed women a longer period of time for promotion prior to mandatory discharge than was allowed men. *Id.* at 500. The *Schlesinger* Court found that, unlike the statutes at issue in *Reed* and *Frontiero*, "the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers . . . are not similarly situated." *Id.* at 508. Similarly, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), a case dealing with the Military Selective Service Act that permitted only men to be drafted, the Court found that "[m]en and women . . . are simply not similarly situated for purposes of a draft or registration for a draft." *Id.* at 78. The *Rostker* Court went on to say that "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Id.* at 79. In both cases, the statutory classification was upheld based on the differences between the sexes.

Thus, in the area of gender discrimination, there is a distinction between those statutory classifications that bear no relationship to actual differences between men and women, and those classifications that are predicated upon those differences. The former are held to a standard of intermediate scrutiny, while the latter are upheld as long as the distinction is rationally related to a legitimate government interest. Nowhere is this same distinction more apparent than in the context of pregnancy regulation.

Geduldig v. Aiello, 417 U.S. 484, presented the question of whether a state disability insurance program, that excluded from coverage disabilities resulting from pregnancy, denied women equal protection. *Id.* at 492. This Court found that there was no denial of equal protection because gender discrimination, as previously defined in *Reed* and *Frontiero*, *did not exist with respect to the disability plan*. *Id.* at 496 n.20. The Geduldig court stated that

> [t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical conditionpregnancyfrom the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex based classification . . . . The program divides potential recipients into two groupspregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

Id. This case has caused great consternation among those

arguing for an equal protection right to abortion. Logically, if pregnant women are not similarly situated with respect to nonpregnant persons, a law prohibiting abortion would not be a denial of equal protection to all women as a class, and therefore, not gender discrimination. *See* Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 985 (1984). The statute would only need pass the rational basis test for the purposes of equal protection analysis. Thus, several constitutional scholars have devised "equal protection models" in an effort to get around *Geduldig* while at the same time trying to provide some sort of constitutional basis for the right to abortion.

D. *Proposed Alternative Equal Protection Models*

1. The Equal Treatment — Assimilationist — Approach

The assimilationist model, as set forth by Professor Wendy Williams, is essentially based upon two propositions. First, generalizations that are based entirely on a person's sex, regardless of where those generalizations come from, are not permissible. Second, even if a law is not based on a sex generalization, those wishing to uphold the law should carry the "burden of justification, if the law has "a disproportionately negative effect upon one sex." Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Social Change 325, 329-330 (1984-85) (The latter proposition Williams refers to as the "disparate effects theory" which would "permit[] . . . a challenge to neutral rules based on a male prototype." *Id.* at 364.). While Professor Williams agrees that both the assimilationist model and the special treatment model, *see infra*, can be the basis of "positive rights" for women, *id.* at 375, she asserts that assimilation is the best approach because "the equal protection clause is unlikely to ever be interpreted to require equal treatment because an excluded class is different from the included class." *Id.* at 361 n.143.

The purpose of this model is to prevent legislators from classifying on the basis of sex, and instead, force them to

"classify on the basis of the trait or function or behavior for which sex was used as a proxy." *Id.* at 329 (As examples of these "traits" Professor Williams states that "[s]trength, not maleness. would be the criterion for certain jobs; economic dependency, not femaleness, the criterion for alimony." *Id.*). The ultimate objective is "to get the law out of the business of reinforcing traditional, sex-based family roles." *Id.* at 352. To achieve this objective, Professor Williams would define equality by using an androgynous prototype which "requires sex neutral schemes that take into account the normal range of human characteristicsincluding pregnancy." *Id.* at 369. She would also subject all sex-based classifications to strict judicial scrutiny. *Id.* at 363 n.144. Thus, Williams' assimilationist approach redefines equality by using an androgenous standard rather than a male or female standard.

Feminist critics of the assimilationist model define it as a model that "treat[s] men and women as if they were interchangeable," thereby "minimiz[ing] the significance of . . . [their] reproductive differences." *Kay, Models of Equality*, 1985 U. Ill. L. Rev. 39, 40 (1985) [hereinafter Kay I]. Others characterize it as a model that recognizes "no real differences between the sexes . . . that cannot be dismissed as illusory sex-stereotypes." Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U. L. Rev. 513, 538 (1983). Oddly enough, these critics seem to agree that the worst problem with the model is that it accepts "maleness" as the standard by which assimilation is to occur. *Id.* at 539; *See also*, Law, *supra*, at 968; L. Tribe, *American Constitutional Law* § 16-29, 1583 (1988). In so doing, the model becomes "incapable of defining sexual equality in the context of sex-specific conditions," Krieger & Cooney, *supra*, at 538, such as reproduction.

Krieger & Cooney argue that this flaw in the assimilationist model "permits a denial of equality of effect to women who are either unwilling or unable to assimilate to . . . [the male] norm." *Id.* at 539. To Krieger and Cooney, the model does not go far enough. While the assimilationist view would assure

equal treatment to those similarly situated (*i.e.* all those who fit within the male prototype), it would not avoid a result similar to that reached in *Geduldig* where women are not similarly situated to men with respect to pregnancy. Professor Kay levels the same criticism when she states that the model is "inadequate . . . for those few situations where the law must confront immutable sexual reproductive differences." Kay I, *supra*, at 41.

Obviously, if the assimilationist model uses a male prototype, there is no escaping the Court's result in *Geduldig*. The androgenous prototype, however, is just as problematic. First, what exactly is androgyny? It is defined as "[h]aving the characteristics or nature of both male and female." *Webster's Ninth New Collegiate Dictionary* 84 (1985). But, for the purposes of equal protection analysis, which characteristics are included in the androgenous prototype? Certainly, Professor Williams would include pregnancy, but beyond that, she offers little guidance. Second, Professor Williams, like others noted below, is simply redefining the relevant equal protection classification. While the Court defines the relevant equal protection classifications as men and women for the purposes of gender discrimination, Williams would define the classification as androgenous people. This definition means that any legislative distinction drawn between men and women, however unsimilarly situated, would be subjected to strict judicial scrutiny.

2. The Episodic Approach

Professor Kay's episodic model is premised on the belief that "reproductive behavior is episodic and temporary." Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L.J. 1, 24 (1985) [Hereinafter Kay II]. Kay advocates an "episodic" approach because, pregnancy will "never satisfy the comparability standard inherent in the . . . [assimilationist approach] for, by definition, there are no similarly situated pregnant men." Kay I, *supra*, at 81. The episodic model draws a distinction based on the duration and effects of reproductive behavior. For the purposes of the episodic approach, reproductive behavior of females lasts nine months, while that of males "is quite brief in duration." Kay II, *supra*, at 24. Also, the effects of reproductive behavior are more debilitating to a woman's opportunities than to a man's. *Id.* at 26, 27. Episodic analysis "enable[s] the law to treat women differently than men during a limited period when their needs may be greater . . . as a way of ensuring that women will be equal to men with respect to their overall . . . opportunities." *Id.* at 34.

The purpose of this model is to "compensat[e] for biological reproductive sex differences that would otherwise handicap women and impede their realization of equal . . . opportunity." *Id.* at 18. In the context of *Geduldig*, episodic analysis requires that the "relevant reference group . . . [be] limited to those persons who have engaged in reproductive behavior while continuing to work." *Id.* at 30. This reclassification results in the conclusion that pregnant women are similarly situated with respect to men and nonpregnant women, and are therefore entitled to the same benefits that accrue to the latter class. According to Kay, this includes the benefit of being free of burdens from which others in the group are free, such as pregnancy. According to Professor Kay, this result furthers the concept of equality of opportunity by ensuring that, just like men, women are not disadvantaged by engaging in reproductive behavior. *Id.* at 26. The same reasoning would obviously apply to a woman's desire to terminate her pregnancy. *Id.* at 23 n.125. A law restricting abortion would treat some individuals who had engaged in reproductive behavior differently from others who had done the same.

The thought of this Court declaring "persons who engage in reproductive behavior" a suspect or even quasi-suspect class is ridiculous. People who engage in reproductive behavior can hardly be considered a "discrete and insular minority" in the sense that Justice Stone employed that term in his famous *Carolene Products* footnote. 304 U.S. at 144 n.4. Nor would this classification be considered suspect since "it is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of

political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Finally, if strict scrutiny is not applicable to classifications based on mental retardation, *see Cleburne*, 473 U.S. 432, wealth, *see Rodriguez*, 411 U.S. 1, and age, *see Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), it is hard to imagine that this Court will set aside for special consideration those who engage in reproductive behavior.

Secondly, the episodic model confuses reproductive behavior with the results of that behavior. A pregnant woman is obviously not engaging in reproductive behavior for nine months in the sense that she is perpetually engaging in sex during the term of her pregnancy. Rather, the pregnancy is a possible result of her having engaged in reproductive behavior (*i.e.* having had intercourse). This is an important distinction, because it means that Professor Kay defines the duration of a male's reproductive behavior to include only the act, while she defines the duration of a female's reproductive behavior to include both the act and a possible result. It is not a necessary result of engaging in reproductive behavior that a woman becomes pregnant. Therefore, all women who engage in reproductive behavior are not similarly situated; some become pregnant while others do not. For the purposes of the Court's equal protection analysis, Professor Kay's reproductive behavior classification, in reality, leads to the same result that the *Geduldig* Court found: persons who engaged in reproductive behavior and happened to become pregnant, verses persons who engaged in reproductive behavior and did not become pregnant. Thus, there would be no gender-based discrimination because an abortion restriction would apply only to those who happened to become pregnant, and not an entire gender as a class.

3. The Special Treatment Approach

The special treatment model attempts to redefine equal protection analysis by focusing on the "biological reproductive

differences between men and women." Law, *supra*, at 955. This model, like the episodic approach, rejects the assimilationist premise that "sex-based biological differences are wholly insignificant . . . [because] changes in social, cultural, and legal arrangements [can] not make [biological] differences disappear . . . [and] assimilation seems often to mean assimilation to a male norm." *Id.* at 966, 968. The purpose of the special treatment approach is to point up the biological differences between men and women that "have been used to justify sex-based legal and cultural limitations on human potential that do not reflect any real difference between men and women and that enforce the inferiority of women and the dominance of men." *Id.* at 969.

Professor Law, a strong advocate of the special treatment approach, is not shy about stating her divergence from the traditional constitutional concept of equality. "[T]he appropriate function of the law is not to enforce a general vision of what men and women are really like." *Id.* According to Law's version of the special treatment approach,

> laws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state interest . . . . [T]he state should bear the burden of justifying its rule in relation to either proposition.

Id. at 1008-1009. The test requires a determination of whether the law applies to reproductive biology and a determination of whether the law perpetuates the oppression of women. If it does oppress women, the law is subjected to strict scrutiny. *Id.* at 1013-1014. As one can easily see, this is a far more searching inquiry than this Court has ever applied under the guise of equal protection analysis. In applying this test to abortion, Law finds immediately that any restriction of the "right" to abort could conceivably oppress women. "By restricting access to abortion, the state necessarily denies the capacity of women as independent moral decision makers." *Id.* at 1019. A law

impinging on a woman's ability to get an abortion "dramatically impairs the woman's capacity for individual self determination, [and] imposes a crushing restraint on the heterosexual woman's capacity for sexual expression." *Id.* at 1017, 1019. Thus it is clear that under Professor Law's analysis, any law restricting abortion would be subjected to strict scrutiny. Implicit in this realization is the conclusion that any such law should be struck down because "such laws enforce the invasion of women's bodies." *Id.* at 1017.

It is in this camp—special treatment—that Professor Laurence Tribe would pitch his tent. While Tribe would agree with some of Professor Kay's analysis, his approach, in the main, is similar to the work of Professor Law. Like Kay, Tribe would agree that "the proper comparison in *Geduldig* was . . . between female employees who had engaged in reproductive behavior and male employees who had done likewise." L. Tribe, *supra*, § 16-29 at 1584 (citing Kay II, *supra*, at 30, 31, 35.). Tribe also agrees that equality of opportunity should be the focus of equal protection analysis for laws dealing with pregnancy. *Id.* (citing Kay II, *supra*, at 26.). Tribe would agree with Law, however, that a woman's role in reproduction is special, and therefore requires special treatment by the courts and the legislatures. *Id.* § 16-29 at 1583 (quoting Law, *supra*, at 1007.). Tribe bases his equal protection analysis on "an antisubjugation principle, which aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens." *Id.* § 16-21 at 1515. Under this analysis, strict scrutiny would be applied to legislation that "given . . . [its] history, context, source, and effect, seem[s] most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward a subjugated group, or a pattern of indifference to the interests of that group." *Id.* § 16-21 at 1520. Given that "[a]bortion . . . involv[es] the intensely public question of the subordination of women to men through the exploitation of pregnancy," *id.* § 15-10 at 1353, there exists a "constitutionally problematic subjugation of women in the law's indifference to the biological reality that

sometimes requires women but never men to resort to abortion . . . to . . . retain control of their own bodies." *Id.* § 15-15 at 1385. Thus with Tribe, a law restricting abortion would violate his antisubjugation principle because carrying a child to term subordinates women as a class. *See id.* § 15-10 at 1354 ("Even a woman who is not pregnant is inevitably affected by her knowledge of the power relationships thereby created.").

4. A Critique

Proponents of the special treatment approach simply cannot escape the fact that not all women are pregnant women. Even though virtually all women have the capacity to become pregnant, it does not follow that laws that draw distinctions on the basis of reproductive biology discriminate on the basis of gender. Contrary to Professor Tribe's assertions, such distinctions do not affect the female gender as a whole, but instead, only those members of the gender that happen to be pregnant. Absent gender discrimination or a determination that pregnancy is a suspect classification, this Court would apply a rational basis test to abortion legislation, even though Professor Tribe might wish to apply strict scrutiny.

The special treatment approach is antithetical to traditional equal protection jurisprudence. This Court has a long history of ensuring that similarly situated persons are treated similarly. *See Royster*, 412 U.S. at 415. Special treatment analysis admits that men and women are not similarly situated with respect to reproductive biology, but then requires the legislature to either ignore these differences or enact laws that will compensate women as a class for those differences. Men and women are then not treated equally, as the Constitution requires, but rather women as a class are given more protection of the laws than similarly situated men in an effort to equalize the effects of pregnancy. Women would certainly benefit from the special treatment approach, just as the poor would benefit from a redistribution of wealth, but this benefit would come at the expense of the constitutional concept of equality under the laws.

Ultimately, the special treatment model, like the episodic approach, is really not a model of equality — in the sense of equal treatment — but instead, it is a "liberal ratchet," *see* R. Bork, *supra*, at 92,[4] to be used to reach what some believe are socially desirable results. Professor Kay cites Professor Ronald Dworkin for the proposition that the equal protection clause embodies two different types of rights: the right to equal treatment and the right to treatment as an equal. R. Dworkin, *Taking Rights Seriously* 276-277 (1977); *see also* Kay I, *supra*, at 87; Krieger & Cooney, *supra*, at 553-554. The latter of these two rights Dworkin defines as "the right . . . to be treated with the same respect and concern as anyone else." R. Dworkin, *supra*, at 227. Dworkin further states that "the right to treatment as an equal is fundamental, and the right to equal treatment, derivative." *Id.*[5] From this, "[e]quality can be seen as an individual right to equal treatment or as a social policy promoting equality of effect." Krieger & Cooney, *supra*, at 554. Thus, the argument is that some classes of people are entitled to treatment as equals even though they are not similarly situated with those with whom they are asserting equality. This, in short, is the underlying argument of both the episodic approach and the special treatment model.

In further discussing the "right to be treated as an equal," Dworkin warns that "we must be careful not to overstate what . . . [the right to be treated as an equal] means." R. Dworkin, *supra*, at 227. "An individual's right to be treated as an equal means that his potential loss must be treated as a matter of concern, but that loss may nevertheless be outweighed by the

[4] Judge Bork uses this term in characterizing Justice Brennan's view of section 5 of the fourteenth amendment. In discussing Brennan's opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), Bork states that "Justice Brennan was forced into the position that the power to enforce [under section 5] was a liberal ratchet, it could go only in one direction."

[5] Dworkin gives the following example that is also quoted in Krieger & Cooney, supra, "If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug."

gain to the community as a whole." *Id.* Assuming for the sake of argument that such a right exists,[6] it in no way follows that a law restricting abortion denies pregnant women equal treatment as Dworkin defines that concept. Clearly, using Dworkin's analysis, the gain to society, e.g., of its continued existence through successive generations outweighs the temporary inconvenience to those women who become pregnant. Thus, even Dworkin's analysis would place limits upon the concept of equality of results.

This Court has never interpreted the equal protection clause to require that statutory distinctions between similarly situated people achieve equal results among those people. Similarly, this Court has never held that people who are not similarly situated must be treated equally by a legislature, if the statutory classification is rational. Therefore, it is beyond reason to assert that this Court should require legislatures to ensure equal results among groups that are clearly and admittedly not similarly situated. See Coleman, Roe v. Wade: *A Retrospective Look at a Judicial Oxymoron*, 29 St. Louis U.L.J. 7, 38 (1984) ("Equal treatment [sometimes] produces unequal results, but the results are essential to preserve individual rights for everyone.").

In analyzing Professor Tribe's version of the special treatment approach, its extremely broad application is immediately apparent. The antisubjugation principle would invalidate all types of legislative classifications, not just those based on the biological differences between men and women. Classifications based on age, sex, wealth, mental retardation, gender, illegitimacy, and alienage would all be subjected to strict judicial scrutiny. In fact, any group, or for that matter any individual, who could lay claim to somehow being "subjugated" by the government, could seek redress in the courts. Actual, perceivable differences between groups of people could no longer be taken into account by legislatures. Instead, legislators would draw distinctions uneasily, knowing that if a class is

[6] Your amicus neither admits nor condones the existence of such a right.

somehow subjugated by the distinction, the law would have to be narrowly tailored to meet a compelling governmental objective.

This result clearly violates a statement of this Court that Professor Tribe is fond of quoting: "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (Tribe uses this quote to attack the assimilationist model, L. Tribe, *supra*, at 1583, but it is just as applicable to the special treatment approach.). This Court has long recognized and given deferential treatment to the prerogative of a legislature to draw distinctions between groups that are not similarly situated. *See, e.g., Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931); *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362 (1940); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914); *Miller v. Wilson*, 236 U.S. 373 (1915); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928). In *Tigner v. Texas*, 310 U.S. 141 (1940), this Court through Justice Frankfurter stated that

> [t]he equality at which the equal protection clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws," and the laws are not abstract propositions. They do not relate to abstract units A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.

Id. at 147. Tribe's antisubjugation principle posits a "disembodied equality" that would completely curtail the legislatures' ability to draw necessary statutory distinctions between people who are not similarly situated.

Professor Law's version of the special treatment approach is a similar attempt at redefining the traditional concept of equality, and would therefore violate the same accepted norms of constitutional adjudication. The oppression standard as

applied to legislative classifications, would result in the same evil that the antisubjugation principle would propagate. In the context of gender discrimination alone, it refuses equal treatment for both sexes, because it is obsessed with compensating pregnant women for their pregnancy. In short, Professor Law does not want equal protection of the laws; she wants the law to effectuate her personal concept of equality.

All of the above equal protection models have thus failed to endow pregnancy with the necessary attributes that would compel this Court to apply heightened scrutiny to a legislative restriction on abortion. Both the assimilationist view and the episodic approach would redefine the constitutionally relevant group so that pregnant women would be viewed as similarly situated with nonpregnant persons. These approaches are unavailing because this Court is just as unlikely to recognize androgyny as a classification as it is to find that people who engage in reproductive behavior are a suspect class. In admitting that men and women are not similarly situated with respect to reproductive biology, episodic analysis and the special treatment approach both fail to invoke heightened scrutiny. Equality of the laws simply cannot and should not be perverted to require an equality of results ensured by the government among persons who are not similarly situated.

As may be seen from this analysis, the underlying notion in the case at bar—that principles of equal protection somehow require that women be allowed free access to abortion-on-demand—is flawed. For purposes of § 1985(3) as for purposes of the fourteenth amendment, women seeking abortions are not a suspect class. To recognize them as such, as the lower courts have done, is to expand the notion of equal protection beyond recognition.

CONCLUSION

For the foregoing reasons, your amicus urges that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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No. 90-985

IN THE
Supreme Court of the United States
October Term, 1990

JAYNE BRAY, *et al.*,
Petitioners,

versus

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF WOMEN EXPLOITED BY ABORTION, INTERNATIONAL (WEBA); VICTIMS OF CHOICE; WOMEN FOR WOMEN; OPEN ARMS; THE INSTITUTE FOR ABORTION RECOVERY AND RESEARCH; SUSAN STANFORD-RUE, PH.D.; POST-ABORTION SUPPORT TEAM (P.A.S.T.); ANNE SPECKHARD, PH.D.; PAULA VANDEGAER, L.C.S.W.; AB-ANON, INC.; AND FEMCARE, AMICI CURIAE IN SUPPORT OF PETITIONERS JAYNE BRAY, *ET AL.*

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INTEREST OF *AMICI CURIAE*[1]

Women Exploited By Abortion, International

Women Exploited By Abortion (WEBA) was founded in 1982 by Nancy Jo Mann in response to her realization that abortion carries serious emotional, psychological, and physical consequences for women, and that society was ignoring these consequences. Based on her own abortion experience, she believed that there were many other women who had been told that abortion was a safe and simple procedure, but who later came to realize they had been deceived. As she travelled around this country speaking about abortion more and more women who had had abortions came forward to join in her efforts.

WEBA's initial focus was on providing support and counseling for women who had had abortions. By 1985, more than 30,000 women had contacted WEBA seeking help. Today WEBA has chapters throughout the United States and in seven foreign countries. Every day, WEBA's headquarters alone receives an average of 50 to 100 phone calls and numerous letters from women who are suffering because of an abortion.

In addition to providing post-abortion counseling, WEBA also provides counseling to women in crisis pregnancy situations who may be considering abortion. WEBA provides not only information about the true nature of abortion, but also practical assistance in finding alternatives to abortion.

WEBA also works to educate the public about abortion and its damaging effects on women. From their own experiences, WEBA counselors and volunteers know that the easy availability of abortion creates pressures on women which effectively negate any other options in dealing with a problem pregnancy. Further, the widespread acceptance of abortion in our society makes women who have had abortions even more reluctant to admit, to themselves or anyone else, that they are suffering.

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[1] Counsel of Record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

Victims of Choice

Victims of Choice is a Christ-centered organization dedicated to both client and counselor, specializing in post-abortion materials, counselor training, and counseling for those suffering from the loss of an aborted family member. The counseling provided by Victims of Choice is based on *A Therapy Model for Crisis Intervention*, a manual written by Nola Jones, one of the founders. Like virtually all founders of post-abortion support organizations, Nola Jones herself underwent an abortion. Today she represents Victims of Choice on radio and television, before legislative committees, and at workshops, conferences, and seminars all over the country and the world.

The *Therapy Model* manual, as well as many other materials produced by Victims of Choice, has received wide distribution. One of the goals of the organization is to educate lay people on how to counsel women suffering from abortions. More than 15 million women in the United States alone have had abortions. The scope of the resulting epidemic of post-abortion trauma necessitates widespread training in how to recognize and deal with it.

Victims of Choice also works to educate the public on the detrimental effects of abortion, not only for women, but for the fathers, grandparents, and siblings of aborted babies. As part of this educational effort, as well as part of the healing process for some women, Victims of Choice sponsors an annual "Memorial of Mourning." At this event, families of aborted babies participate in a funeral during which the remains of an aborted baby are interred in a cemetery. This memorial helps to finalize the woman's grief while letting the public at large know that, for those who have undergone an abortion, it is a death experience, not a safe, simple procedure.

Women for Women

Women for Women was founded in 1987 as a result of workshops and seminars conducted for women in transition from professions or careers to full-time motherhood. The founders wished to give voice to the growing awareness that women's

rights as total and complete persons do not include the right to terminate the life of another unique and separate individual residing *in utero*. They also wished to draw attention to the coercive societal and familial pressures which often lead women to resort to abortion when faced with an unexpected pregnancy. In response to militant pro-abortion organizations claiming to represent women as a whole, Women for Women publishes a newsletter addressing such issues as abortion and the manipulation of women by radical feminists, aided by the propaganda of a biased media.

Open ARMs

Open ARMs is an international Christian ministry dedicated to bringing hope and healing to anyone suffering from abortion's emotional and spiritual aftermath. Open ARMs is primarily made up of people who have personally experienced the tragedy of abortion and who have felt its devastating after-effects. Incorporated in Washington state in 1986, Open ARMs now has a national office in Missouri and chapters throughout the United States as well as in other countries.

Open ARMs representatives carry out their ministry in several ways. They provide one-on-one confidential counseling through telephone hotlines and through contacts made while speaking or working with other pro-life sources. They sponsor monthly support groups during which participants may share their own personal abortion experiences in a non-threatening atmosphere. They also conduct a Bible study program specifically geared toward aiding those suffering from an abortion to achieve forgiveness and healing. Finally, they engage in public speaking to share the message of hope to those hurting from abortion as well as to educate the church and the public concerning the negative effects of abortion on individuals and society.

The Institute for Abortion Recovery and Research

The Institute for Abortion Recovery and Research is a national education, research and treatment center dedicated to the resolution of post-abortion trauma. Founded by Dr. Vincent Rue and Dr. Susan Stanford-Rue, both internationally known experts

on post-abortion trauma, the Institute performs three major functions. First, it offers counseling to individual women suffering from post-abortion syndrome. Second, it provides education and training for lay counselors in dealing with women who have had abortions. Third, the Institute is a center for the study of post-abortion syndrome.

Susan Stanford-Rue, Ph.D.

Susan Stanford-Rue, Ph.D. is known nationally and internationally as an expert in the field of psychological trauma, especially that which results from abortion. Since, 1982, Dr. Stanford-Rue has counseled women who have had abortions and guided them through the steps necessary to bring healing and resolution after the trauma of abortion. Dr. Stanford-Rue's book, *Will I Cry Tomorrow?*, which relates her own near collapse and subsequent recovery after having an abortion, has been translated into several languages and is available in ten countries. Presently, Dr. Stanford-Rue, as well as counseling women individually, trains others to recognize and deal with post-abortion trauma.

Post-Abortion Support Team (P.A.S.T.)

Post-Abortion Support Team (P.A.S.T.) is a support organization based in Michigan. Although recently formed, its founders had prior experience dealing with women suffering emotional and physical trauma following an abortion. The goals of P.A.S.T. are two-fold. First, P.A.S.T. counselors help women suffering from abortions through the healing process, usually by one-to-one counseling, and sometimes through support groups. Second, P.A.S.T. helps post-abortion women find ways to get involved in other activities which help the healing process. These activities include counseling girls and women considering abortion, and joining pro-life political and educational efforts.

Anne Speckhard, Ph.D.

Anne Speckhard, Ph.D. is an internationally known writer and lecturer in the area of post-abortion trauma. In 1985, she authored *Post Abortion Counseling and Education*, a manual designed to train others how to recognize and deal with post-abortion syndrome. This manual has provided the structure for

post-abortion support groups throughout the country. Additionally, Dr. Speckhard has provided expert testimony on post-abortion trauma to the United States Congress and the Center for Disease Control. In her private psychotherapy practice, Dr. Speckhard continues to deal individually with women who have had abortions and with their families.

Paula Vandegaer, L.C.S.W.

Since the early 1970's, *Paula Vandegaer, L.C.S.W.* has been counseling women suffering from post-abortion syndrome. From the vantage point of this experience and her professional training, her writings on the effects of abortion and the necessary steps to healing and psychological recovery have been published internationally. In addition to personally consulting with women who have had abortions, she is frequently called upon to participate in workshops to train others to recognize and deal with post-abortion syndrome.

AB-ANON, Inc.

AB-ANON, Inc. was founded in 1984 by a registered nurse who herself had two abortions. Having worked through her own feelings of debasement, failure, and worthlessness, she formulated a series of twelve steps to repentance and healing for women suffering from abortion. These twelve steps are now shared by AB-ANON through one-on-one telephone counseling with women as well as by distribution in pamphlet form. AB-ANON also has published an instruction manual for women who wish to start post-abortion support groups.

FemCare

FemCare was founded in 1985 for the purpose of providing post-abortion support to women in the greater New York area. In addition to counselling individual women, FemCare provides referrals to other counselors, psychologists and spiritual directors, as well as referrals to attorneys for women victimized by medical malpractice, negligence and fraud. FemCare also helps to arrange for training of professional post-abortion counselors and psychotherapists and offers resource materials on post-abortion recovery for reference and distribution.

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SUMMARY OF ARGUMENT

The focus of this controversy is the second element of 42 U.S.C. § 1985(3), the class-based animus requirement, and whether the conduct of petitioners singled out the class members for treatment that non-members did not receive. Also at issue is the breadth of the statute's reach to classes not defined by the inherent characteristic of race, and whether acts by purely private individuals staging a sit-in protest on public sidewalks and private property within a state can be the basis of a violation of the independent federal right to travel

interstate, particularly in the absence on any evidence of discrimination between in-state and out-of-state travelers.

Amici submit that there are several grounds upon which the court of appeals erroneously interpreted the prior decisions of this Court. First, the factual findings of the district court below demonstrate that petitioners were motivated by concerns other than invidiously discriminatory class-based animus directed at the class *qua* class, i.e. because of its inherent characteristics. The factual findings directly contradict the court's conclusions of law that petitioners' animus was directed at women. The record shows that the animus of the protestors was not directed at the class of women but against the conduct of abortion.

Second, the group identified as the target of the conspiracy, women seeking abortions, is not a protected class under the provisions of the Fourteenth Amendment nor under § 1985(3) because it is not defined by immutable, inherent class characteristics. The record shows that the class of "women seeking abortions" did not suffer any disparate treatment as a result of the protest because they were not denied any rights that any other group was permitted to exercise. All who sought to enter or exit the clinic were precluded from doing so regardless of gender.

Thirdly, respondents also fail to identify an independent federal right which has been violated by the sit-in. The purpose of the conspiracy was not to interfere with interstate travel, but to stop the performance of abortions and to save prenatal children's lives. There is no evidence of any person being engaged in interstate travel or any interstate traveller directly suffering interference from the protestors. There is no showing that interstate travellers suffered disparate treatment which denied them rights that other in-state travellers were permitted to exercise freely.

Finally, although the sites of the sit-in protests were at abortion clinics, and persons seeking abortions may have been adversely impacted by these protests, there are no valid grounds for finding interference with any federally protected abortion rights in this case. Since the federally-protected abortion right is solely to obtain an abortion free from state interference, there can be no federal claim

for violation of abortion rights by a purely private conspiracy where, as here, no state action is involved.

This Court has been justifiably reluctant to expand the classes protected under the provisions of § 1985(3). This reluctance has been motivated by this Court's valid concerns regarding its constitutional authority to do so and by its jurisprudential judgment that it should not over-extend the scope of federal jurisdiction in tort litigation.

Amici do not discount the clash of emotions involved on both sides of the abortion issue or the impact this controversy imposes on this country. Amici do not urge this Court to condone lawless acts or to ignore the millions of lives aborted since *Roe v. Wade*. However, Amici do request that this Court recognize that respondents herein have a complete and adequate forum available to them for redress their grievances. That forum is in state court. Amici respectfully urge this Court to reverse the decision of the court of appeals and return this matter to the appropriate state forum.

ARGUMENT

INTRODUCTION

Stripped of the court of appeals' superficial reasoning stretching the application of 42 U.S.C. § 1985(3) (the "Act") to classes defined by conduct, the decisions of the district court and court of appeals herein compel the conclusion that any sit-in protest by any group of demonstrators constitutes an infringement of the right of interstate travel of any conceivable class of people. If upheld, these decisions will destroy the distinction between federal and state jurisdiction over tort claims. Federal courts will be inundated with a flood of litigation with the added incentive of recovery of attorneys fees under 42 U.S.C. § 1988 by any group who files a claim for any state tort which could even remotely influence interstate travel.

No proof was given that any person actualiy engaged in interstate travel encountered the sit-in protest. The court found that the intent of the protestors was to stop abortions, to deny all persons ingress or egress to the abortion clinic, and to save the lives of the unborn about to be aborted, then concluded that this intent equalled

a discriminatory animus against a "*subset of the class of women*" without any finding that the intent of the protestors was to interfere with the rights of women seeking abortions because they were women or that women were singled out for treatment that men did not receive.

However, in spite of this abject failure to meet the requirements of *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the district court held, and the court of appeals below affirmed, that a sit-in protest by a group of private individuals constituted a federal offense because it interfered with interstate travel rights. Thus, if the decisions below are allowed to stand, § 1985(3)—originally known as an "Act To Enforce the Fourteenth Amendment"—will have effectively become the new "Federalization of State Tort Claims Act," a result never intended by Congress or foreshadowed in any of this Court's prior decisions.

This Court should resist any such invitation to destroy the distinction between state and federal jurisdiction. Rather, it should reverse the court below and limit the use of § 1985(3) to the purpose for which it was intended—namely to protect racial classes or possibly similar classes with inherent, immutable characteristics from widespread systematic discrimination which the states are either unwilling or incapable of preventing. No such unwillingness or incapacity is presented in this case.

It is significant that this Court has previously found the legislative history of the Act unhelpful and has expressed doubt as to whether the scope of § 1985(3) extends beyond race. Under this circumstance, it is most prudential for the Court to defer to Congress the resolution of this jurisdictional question rather than adopt an expansive reading of the Act which effectively eliminates the distinction between federal and state tort law. The wisdom and equity of such deference in this case is only affirmed by the fact that respondents have adequate and effective remedies available at state law.

I.

DISCRIMINATORY ANIMUS MUST BE DIRECTED AGAINST A PROTECTED CLASS *QUA* CLASS, NOT AGAINST A CLASS DEFINED BY CONDUCT.

Under the provisions of *Griffin*,[2] this Court may dispose of this matter without wading into the muddy morass of arguments surrounding the correct interpretation of the legislative history of § 1985(3). It can avoid the debate concerning the constitutional limitations on the authority of Congress to enact such a statute. The Court need not even reach the issue of whether or not the scope of § 1985(3) extends beyond classes defined by race. The district court's factual findings clearly demonstrate that this Court should reverse the courts below on an application of the facts to *Griffin*'s plain requirements concerning animus.

This case can and should be resolved in the same manner that this Court in *Scott* previously resolved a similar alleged violation of § 1985(3)—by focusing on the failure of the plaintiffs to prove and the court below to find the requisite invidiously discriminatory animus directed at a protected class because of their inherent class characteristics.

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[2] This Court has established that to make out a violation of § 1985(3), the plaintiff is required "to prove (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws, and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-829 (1983) (citation omitted).

The Court has further held that the "purpose" defined in the second element requires that the alleged conspiracy "be motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" *Id.* (citing *Griffin*, 403 U.S. at 102). Also, due to the Constitution's limitation on sources of authority for such a broad ranging statute, this Court has required plaintiffs to identify an independent federal right that was violated since § 1985(3) "'provides no substantive rights itself' to the class conspired against." *Id.* at 833 (citing *Great Am. Fed. S. & L. Ass'n v. Novotny*, 442 U.S. 366, 372 (1979)).

A. Findings Of Fact By The District Court Contradict Its Own Legal Conclusions That Petitioners Violated 42 U.S.C. § 1985(3).

The district court's own findings of fact consistently contradict its conclusions of law that the intent of the protestors was to discriminate against women seeking abortions because they were women. The record shows that the intent of the protestors was to prevent all persons from entering the clinic and participating in the provision or obtaining of abortions *regardless of gender* and to save the lives of the "fetuses scheduled for abortion"—which the protestors consider unborn children.

The district court's findings could not be more clear concerning the intent of the protestors:

> "Operation Rescue is an unincorporated association whose members oppose abortion and its legalization. Its principal goals are to stop abortion and to end its legalization. . . . In so doing [blocking entrances and exits to abortion clinics], 'rescuers' view their blockading efforts as 'rescues' of fetuses scheduled for abortion." *National Organization for Women v. Operation Rescue,* 726 F. Supp. 1483, 1487 (E.D. Va. 1989) (hereinafter "*NOW v. OR*") (Pet. App. 18a).
>
> "The individual defendants are persons who are opposed to abortion and its legalization and are deeply committed to taking active steps to advance their views . . . ." *Id.* at 1488 (Pet. App. 19a).
>
> "It is undisputable that all defendants share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization. . . . The purpose of these 'rescue' demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely. No one has put this point any better than defendant Terry, who in an affidavit, states that 'while the child-killing facility is blockaded, no one

> is permitted to enter past the rescuers . . . Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress.' Operation Rescue's literature defines 'rescues' as '*physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims.' *Operation Rescue, National Day of Rescue—October 29, 1988* (1988) (emphasis in original). By disrupting and blockading family planning and abortion clinics, defendants and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views." *Id.* at 1488 (Pet. App. 20a).
>
> "Because 'rescuers' trespass on to clinic property and physically block ingress and egress from the clinic, existing and prospective patients, as well as physicians and medical staff are unable to enter the clinic to render or receive medical or counselling services." *Id.* at 1489 (Pet. App. 21a).

Thus the uncontradicted findings of fact indicate that the intent of the protestors was to "intervene between abortionists and the innocent victims," to "prevent abortions," "block ingress or egress from the clinic," to prevent "existing and prospective patients, as well as physicians and medical staff," or "families of patients" from entering the clinic to perform or obtain abortions (regardless of gender), and "to save fetuses scheduled for abortions." Nowhere does the court make a single *finding of fact* that the intent of the protestors is to discriminate against women *because* they are women.

Neither does the court find that members of the class are denied a right that non-members enjoy. Ingress and egress from the clinics are denied to all, male or female, physicians, staff, potential patients, and families of patients, regardless of whether they are "seeking abortions" or performing abortions, or merely encouraging or supporting abortions. By concentrating the focus of inquiry too

narrowly, the district court ignored the broader scope of the sit-in protest and only considered a subset of the entire group, when it was the entire group, not just a subset, that was the target of petitioners' protests.

The court of appeals likewise ignored the broader scope of the demonstration. In spite of these singular findings of fact—that the motivation of the protestors is directed against the act of abortion by *all* who would participate, regardless of gender, in order to save the lives of unborn children scheduled for abortion—the court of appeals affirmed the district court's conclusion that the protestors had an invidiously discriminatory animus against women. The court held, in effect, that opposition to abortion and attempting to save what is believed to be human life constitutes discrimination against women *per se* even when the uncontroverted evidence indicates a distinctly different motivation.

In holding that opposition to abortion was discrimination against women *per se*, the district court contradicted the factual findings above and made the following leaps of logic in its Conclusions of Law:

> "Plaintiffs' members and patients constitute a **subset of a gender-based class** meeting these requirements [of being a class possessing discrete, insular and immutable characteristics]. . . . The court concludes that a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under Section 1985(3)." *NOW v. OR*, 726 F. Supp. at 1492-93 (Pet. App. 29a) (emphasis added).
>
> "Defendants engaged in this conspiracy for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counselling services, of the right to travel." *Id.* at 1493 (Pet. App. 29a-30a).

Having found that the intent of the protestors was to stop abortions and to save fetuses scheduled for abortions, the district court completely ignored its factual findings to assert that the real intent of the protestors was to stop a subset of the class of women from engaging in interstate travel.

Yet the courts below failed to make any consistent legal conclusion as to the nature of the motivation or animus against the protected class *qua* class. The district court failed to make the legal conclusion that the protestors acted with invidiously discriminatory animus against the women seeking abortion *because they were women*. The unavoidable reason is because the facts show this premise was simply not true. This logical house of cards collapses completely on the animus element alone. This Court should reverse the court of appeals on the grounds that the animus of the protestors was directed against the conduct of abortions and for the saving of lives and not against women *qua* women.

B. The Decision Of The Court Below Directly Contradicts The Prior Decisions Of This Court Which Require That The Discriminatory Animus Be Directed Against A Protected Class Because Of Its Inherent Characteristics.

This controversy falls in the same analytical vein that this Court confronted in *Scott*. The decision of the court of appeals should be reversed because respondents' have failed to prove that there is "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action,'" *Scott*, 463 U.S. at 834 (quoting *Griffin*, 403 U.S. at 102). In order to satisfy the animus requirement, this Court has required plaintiffs to show that the animus was directed against them as a class *because of their class characteristics* and that the class was one of those intended to be protected under § 1985(3).

The district court and court of appeals failed to find that petitioners' motivation to act against respondents was because the women seeking abortions were women. Indeed, the district court recognized its inability to support a conclusion that the animus of petitioners was directed against women as a class. It instead could only find that the animus was directed at a *sub-class* of the class of women, and the court never made any finding whether or not the motivation was because the class members were women. This completely ignores this Court's holdings in *Griffin* and *Scott*.

In analyzing the dilemma presented to the Court by the sweep of the statutory language and the limitations of Congress' constitu-

tional authority under the Fourteenth Amendment to enact such provisions, the Court recognized that the requirement of an invidiously discriminatory animus against a protected class would give effect to the statute without running afoul of these limitations. *Griffin*, 403 U.S. at 102.

If the animus requirement is to have any limiting effect, it must be applied as the *Griffin* Court expounded it, namely that the acts must be taken against the class because of inherent characteristics which make the targets of the conspiracy members of the protected class—animus against the class *qua* class. As the *Griffin* Court held, the allegations concerning the motivation of the conspirators was adequate to meet the animus requirement where the plaintiffs alleged the purpose of the conspirators was to "deprive the petitioners [blacks and their supporters] of the equal enjoyment of legal rights ***because of their race***." *Griffin*, 403 U.S. at 103 (emphasis added).

This is also the thrust of the Court's decision in *Scott* holding that the statute does not reach "conspiracies motivated by bias towards others on account of their *economic* views, status, or activities." *Scott*, 463 U.S. at 837 (emphasis in original). Indeed, the Court observed that were it to hold conspiracies motivated by economic animus to be covered by § 1985(3), it "could be brought to bear on any act of violence resulting from union efforts to organize an employer or from the employer's efforts to resist it, so long as the victim merely asserted and proved that the conduct involved a conspiracy motivated by an animus in favor of unionization, or against it, as the case may be." *Scott*, 463 U.S. at 838.

The warning in *Scott* applies equally here, where a group of abortion seekers and providers are claiming to be victims of a conspiracy motivated by an animus against abortion. Applying the animus against a class *qua* class requirement of *Griffin* and *Scott* shows that the claims asserted here by abortion seekers are an attempt to seek a federal remedy for what is at most a political controversy *motivated by an animus against a particular conduct and not against a protected class because the victims are members of that class*.

Even Justice Blackmun, arguing for the dissent in *Scott*, agreed

with the nature of the animus required. "As an initial matter, the intended victims must be victims not because of any personal malice the conspirators have toward them, but *because of their membership in or affiliation with a particular class*. Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action." *Scott*, 463 U.S. at 850 (citations omitted) (emphasis added). The court of appeals below failed to apply these elements of the offense in rendering its ruling and therefore should be reversed.

Respondents herein invite the Court to cast aside this sound rule of limitation and convert § 1985(3) into a much broader remedy where the class may be defined by the common conduct of its members. Such a conversion would impermissibly create a multiplicity of transient classes vaguely defined by their ever-changing behavior unrelated to any class that this Court has ever recognized to be entitled to protection under the Fourteenth Amendment. This was exactly what the Court in *Griffin* and *Scott* refused to do. As the Court has recognized,

> [W]e find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or to do other injury to a competing group by use of otherwise unlawful means. To accede to that view would go far toward making the federal courts, by virtue of § 1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume. If respondents' submission were accepted, the proscription of § 1985(3) would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings.

Scott, 463 U.S. at 836.

This Court has previously recognized that the drafters of the statute "did not provide a federal remedy for 'all tortious, conspiratorial interferences with the rights of others.'" *Id.* at 834 (quoting *Griffin*, 403 U.S. at 101). Its drafters believed that "Congress lacked

the authority to punish every assault and battery committed by two or more persons." *Id.* (citing *Griffin*, 403 U.S. at 102; Cong. Globe, 42nd Cong., 1st Sess., App. 68, 115, 153, 188, 315 (1871)).

Under respondents' overly broad concept of § 1985(3), the class exists because of conduct and as long as the conspirators' motivation is to oppose the conduct, a violation of the statute has taken place. The obvious result is that any conduct can define the class and any opposition to that conduct which might remotely affect the interstate travel of any other member of the class constitutes a federal violation. This is not consistent with the purpose of the statute and subsequent interpretations of it by this Court.

C. Circuit Courts Which Have Correctly Applied The Class *Qua* Class Animus Requirement Have Properly Denied The Federal Claim.

The federal courts of appeal which have confronted and carefully examined the animus requirement in private conspiracy claims under § 1985(3) have concluded that the "class-based, invidiously discriminatory animus" requirement must be based on a motivation against the class *qua* class.

In *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), the court was confronted with a class consisting of "women of childbearing age who seek medical attention from the MWMC." *Id.* at 794. The court assumed for the sake of argument that this group constituted a class, but ruled that "MWMC still has not shown that the protestors acted with an invidious discriminatory *animus* against that particular class." *Id.* (emphasis in original). The facts of the case showed that the protestors did not target any particular group but rather tried to dissuade anyone who contributed to abortions. *Id.* In *Roe v. Abortion Abolition Society*, 811 F.2d 831 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987), the court of appeals similarly recognized that the discrimination must be "a class-based animus, that is a prejudice against a group of persons or against a particular person because of his membership in that group." *Id.* at 934.

This animus requirement is a key factual finding which distinguishes a common state law tort from a federal civil rights violation.

To ignore this distinction, as the courts below did, is to blindly equate private demonstrations against abortion rights with gender discrimination regardless of the protestors' motivations. Respondents should not be permitted to cut out a portion of the whole group impacted by a demonstration and erect a claim of federal civil rights violations for themselves by denying the real motive of the protestors' conduct. This Court should affirm the animus requirement of *Griffin* and reverse the decision of the court of appeals.

II.
REGARDLESS OF THE ANIMUS FINDING, THE CLASSIFICATION OF "WOMEN SEEKING ABORTIONS" CANNOT QUALIFY AS A PROTECTED CLASS UNDER § 1985(3).

This Court has not resolved the question of whether or not § 1985(3) extends to protect any classifications of persons beyond racial classifications. Assuming for sake of argument that it does, the acceptance by the lower courts of a class consisting of "a subset of the class of women" is a patently erroneous application of the teachings of *Griffin* and *Scott*. Either the animus is directed against the protected class, defined by its inherent characteristics, or it is not. Defining the class as a "subset of the class of women" simply means that the animus is not directed against women—rather it is directed against persons engaged in a certain mode of conduct which utterly fails to meet the definition of any "classification" this Court has ever recognized as subject to protection under § 1985(3).

A. Scope Of Protected Class

This Court has held that § 1985(3) clearly extends to racially based discriminatory animus, but has withheld deciding whether it extends beyond race. "The language requiring intent . . . means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." *Griffin*, 403 U.S. at 102 & n.9.

The *Scott* decision expressed similar reservations. "[I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *Scott*, 463 U.S. at 836. Thus at one end of the spectrum is racial discrimination, which the Court has held to be clearly within the scope of § 1985(3); at the opposite end, the Court has refused to extend the coverage of the statute to include "conspiracies motivated by economic or commercial animus." *Scott*, 463 U.S. at 838.

In *Novotny*, this Court held that § 1985(3) did not provide a remedy for gender-based discrimination based on violation of Title VII. In reaching this conclusion, at least two Justices contended that § 1985(3) did not extend to gender-based discrimination by wholly private conspiracies. Justice Powell, in his concurring opinion, wrote, "Nor does the Constitution create any right to be free of gender-based discrimination perpetuated solely through private action." *Novotny*, 442 U.S. at 381.

Justice Stevens, in a separate concurring opinion, stated this proposition even more clearly,

> Private discrimination on the basis of sex is not prohibited by the Constitution. The right to be free of sex discrimination by other private parties is a statutory right that was created almost a century after § 1985(c) was enacted. Because I do not believe that statute was intended to provide a remedy for the violation of statutory rights—let alone rights created by statutes that had not yet been enacted—I agree with the Court's conclusion that it does not provide respondent with redress for injuries caused by private conspiracies to discriminate on the basis of sex.

Novotny, 442 U.S. at 385 (footnote omitted). Therefore, the concurring opinions in *Novotny* cast considerable doubt on the proposition that a gender-based classification is a "class" protectable under § 1985(3).

The Court's reluctance in *Griffin*, *Novotny* and *Scott* to extend the classifications of individuals entitled to protection under § 1985(3) is based on wise jurisprudence and the now generally accepted

interpretation of the legislative history of the Act.[3] This same wisdom compels the Court in this case to reject any gender-based classification. At the very least, this wisdom instructs this Court to reject a "pseudo" gender-based classification which is actually defined by conduct, rather than any inherent, immutable characteristics.

B. Circuit Courts Have Rejected The Class Of "Women Seeking Abortions" As A Class Protected Under The Scope Of § 1985(3).

Courts have recognized that classifications identified by conduct do not define a protected class under § 1985(3). The classification of "women seeking abortions" has been specifically rejected as a valid class by the Eighth Circuit Court of Appeals.

In *Lewis v. Pearson Foundation, Inc.*, 917 F.2d 1077 (8th Cir. 1990), an equally divided Eighth Circuit *en banc* court affirmed a district court decision rejecting this defective class allegation. The district court had followed the interpretation of the animus requirement in *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987). *See also Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318 (8th Cir. 1990) (original panel decision reversing decision of district court), *vacated*, 917 F.2d 1077 (8th Cir. 1990) (en banc).

One district court decision presently on appeal in the Ninth Circuit also recognizes the impropriety of attempting to define the class as a "subset" of the larger class because of the circular reasoning it entails:

> For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender.

National Abortion Federation v. Operation Rescue, 721 F. Supp.

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[3] In *Scott*, the Court accepted the legislative history of the Act set forth in *Griffin* as authoritative. *Scott*, 463 U.S. at 835.

1168, 1171 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990).

Defining a "protected" classification as a subset of a larger gender-based classification which in itself may or may not be a protected class completely vitiates the class-based animus requirement. Any class offended by a sit-in will qualify for protection under this unbounded interpretation of § 1985(3) because any group will invariably be able to demonstrate that at least *some* of its members constitute a subset of some more clearly protected group; i.e., this deliberately selected subset class will consist of those group members who form a subset of a racial group or other protected class.

Such an anomalous result contradicts the decisions of this Court expressing reluctance under the Fourteenth Amendment to protect classifications of individuals defined by their behavior, rather than by "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *High Tech Gays v. Defense Ind. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1991) ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such race, gender, or alienage....") (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987)).[4]

The purported classification of "women seeking abortion" is neither an obvious, immutable nor distinguishing trait of women. It is a behaviorial classification defined by how some women respond to their pregnancies. That this classification is defined by behavior is demonstrated by the fact that Amici represent thousands of women who regret having behaved in favor of abortion and many other

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[4] For example, this Court said in *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986):

> [T]o claim that a right to engage in such conduct [sodomy] is "deeply rooted in this Nations' history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.
>
> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

thousands of women who are as opposed to abortion as respondents claim to support it.[5]

C. Appropriate Classes For § 1985(3) Coverage Should Track Only Suspect Or Quasi-Suspect Classes Based On Inherent, Immutable Characteristics Of The Class.

If 42 U.S.C. § 1985(3) is truly to be an "Act to Enforce the Fourteenth Amendment," then Amici submit that this Court should restrict the classifications of individuals which are to be protected to those which traditionally have been considered suspect or perhaps quasi-suspect by this Court. *See* Comment, *The Class-Based Animus Requirement of 42 U.S.C. 1985(3): A Limiting Strategy Gone Awry?*, 83 Mich. L. Rev. 88 (1985). Such an approach would provide clarity as to which groupings come under the protection of 42 U.S.C. § 1985(3), while retaining the original purpose of the Act without exceeding constitutional limitations on Congress' authority to enact such legislation. It would provide clear direction for the lower courts which have struggled to define which classes qualify for protection under the Act.

Most significantly, such an approach would best reflect the 120 years of this Court's Fourteenth Amendment jurisprudence wherein this Court has relied on the concept of inherent, immutable characteristics as the basis for classifying individuals needful of protection under the Due Process or Equal Protection clauses of the Fourteenth Amendment. These classes have traditionally included race, gender, religion, legitimacy and national origin, but have excluded classes defined by economic or social behavior, e.g., the adult homosexuals in *Bowers v. Hardwick* and the non-union members in *United Brotherhood of Carpenters & Joiners v. Scott.*

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[5] The Second and Fourth Circuit Courts of Appeals have mistakenly extended the scope of §1985(3) to such a classification defined by behavior in large part because of their failure to inquire into the motivation of the protestors or their assumption that animus directed against the aborting of unborn human fetuses constitutes *per se* discrimination against women. *See New York State N.O.W. v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

To be a "suspect" or "quasi-suspect" class, the group as classified must (1) have suffered a history of discrimination; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) show that they are a minority or politically powerless, or alternatively show that the state action at issue burdens a fundamental right. *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); see also *High Tech Gays*, 895 F.2d at 573. The proposed classification in this case—women seeking abortion—meets none of these requirements.

Women seeking abortions in this country, whether defined by their educational status, economic well-being, social acceptance, employment opportunity or any other useful indicia, do not exhibit any of the evidences of systematic discrimination traditionally relied upon by this Court in defining the suspect or quasi-suspect nature of discrimination on the basis of race, religion, gender, legitimacy or national alienage.

Women seeking abortions are not "obvious" physically, particularly in the first 24 weeks of pregnancy when most abortions are induced. In fact, if anything is obvious it is that pregnant women more often than not seek to complete their pregnancy rather than to abort. This indisputable fact alone establishes that "seeking abortion" is not an "immutable" or "distinguishing" characteristic or trait of women.

Far from being a minority or politically powerless, women seeking abortion have demonstrated that they are well organized and well represented politically, even enjoying majority support in some state legislatures as well as the favor of some state governors.

Lastly, women do not have a fundamental right to obtain an abortion that is valid against purely private actors. *Roe* only protected the privacy right of a woman not to have her choice to have or not to have a child interfered with by the *government* absent a showing of a compelling state interest. Insofar as the courts below found that there was no state action involved in the private dispute underlying this case, this Court has absolutely no reason to recognize that "women seeking abortions" are a suspect or quasi-suspect class entitled to special protection under the Due Process or Equal Protection clauses of the Fourteenth Amendment.

III.
THE COURT OF APPEALS' DECISION SHOULD BE REVERSED BECAUSE NO VIOLATION OF AN INDEPENDENT FEDERAL RIGHT HAS BEEN SHOWN

Amici believe the misapplication of the invidiously discriminatory class-based animus requirements, as discussed above, provide a clear basis for reversing the decision of the court of appeals. In addition, the alleged federal rights which respondents claim have been violated by petitioners' conduct are merely dressed-up state tort, trespass, and nuisance claims masquerading as federal civil rights violations. This Court should end the charade and return these state law claims to their proper forum.

A. A Violation Of The Right To Travel By Private Individuals Requires Direct Interference With The Rights Of Persons Actually Engaged In Interstate Travel.

The tortious conduct complained of is that a subset of the class of women, namely women engaged in a particular mode of conduct, were denied the right to travel interstate freely. This contention was upheld by the court of appeals in spite of the failure of the district court to find that persons actually engaged in interstate travel suffered interference, that it was the purpose of the sit-in protestors to interfere with travel, or that it was the intent of the protestors to deny the right to travel of this group because they were women and because they wanted to deny them interstate travel rights that would be otherwise enjoyed by men. The reason is clear. The factual bases for such findings are wholly absent.

The courts below failed to recognize that the thrust of the sit-in protests was not to interfere with interstate travel, but rather to stop the abortions which were taking place inside the clinics. There was no showing that any person actually travelling from out-of-state was physically restrained from entering a blockaded clinic. Respondents invite the Court so to broaden the scope of *Griffin* that any conduct by private parties which ever so slightly burdens even *potential* interstate travellers would constitute a federal offense. The Court

should reject this overzealous request to water down the pleading requirements of § 1985(3). Such a holding would destroy the limitations on federal question jurisdiction by abolishing the distinction between state torts and federal civil rights violations.

The only case known to Amici which involves private interference with interstate travel under § 1985(3), *Griffin v. Breckenridge*, recognized that very specific allegations must be proven in order to show a violation of the right to travel. According to the *Griffin* decision, to find that a violation of interstate travel has occurred, where no state involvement is shown, the plaintiffs must show that (1) some person was actually engaged in interstate travel and that they were interfered with during the course of that interstate travel, (2) that petitioners engaged in their conduct for the purpose of interfering with those persons engaged in interstate travel or (3) that out-of-state travellers were treated differently than in-state travellers. *Griffin*, 403 U.S. at 106.

In this matter, respondents have not shown that any of the above occured. There is only the finding that the respondent abortion facilities were the subject of one blockade in the October of 1988 and a threat of blockades in November of 1989, and that the general clientele of the facilities were from various states.[6]

However, there is no evidence that interference with interstate travel actually occurred; nor is there any indication that the protestors treated travelers from inside the state any different from those from outside the state. The record goes on to show that rather than the state failing to act, 240 protestors were arrested by local authorities at one of the sit-ins. 726 F. Supp. at 1489 n.4 (Pet. App. 22a n.4). The occurrence of sporadic sit-ins at which hundreds of arrests are made show that the state law enforcement agencies are neither overwhelmed nor systematically ineffective.

The authorities cited by the court of appeals show how that court miscontrued the standard by which a private interference with

[6] The court appears to include sidewalk picket lines in its definition of "rescues" when suggesting that rescues had been taking place over five years. It is not clear from the record that any of these sidewalk pickets interfered with interstate travel. *NOW v. OR*, 726 F. Supp. at 1489-90 (Pet. App. 22a-23a).

the right to travel is measured. For private actors, proof of actual *discriminatory* interference with the right to interstate travel is required by *Griffin*. 403 U.S. at 106. The court of appeals found *Doe v. Bolton*, 410 U.S. 179 (1973), and *New York State N.O.W. v. Terry*, 886 F.2d 1339, 1360-61 (2nd Cir. 1989), to be adequate authority for holding that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." In so doing, the court failed to evaluate the faulty analysis in *Terry* or to recognize that *Bolton* involved a state erected barrier which *discriminated* between out-of-state residents and in-state residents.

This Court's analysis of interstate travel restrictions differs depending on whether state action is involved. In cases involving state action, the Court prohibits even the slightest interferences by the state due to the pervasive and pernicious impact of discriminatory state imposed barriers on interstate travel. However, in the only interstate travel case under § 1985(3) which has not involved state action, *Griffin*, this Court required a substantial, direct and actual interference with interstate travel. Furthermore, disparate treatment was clearly present in *Griffin*. The right to travel was denied *unequally*—the protected class was not permitted to exercise a right that others were permitted to exercise. Insistence upon these two requirements—a direct substantial interference and a discriminatory intent—is necessary to prevent every assault and battery by two or more persons from becoming a federal offense.

Even though there is no state action alleged in this case, respondents would have this Court adopt a broad standard requiring only indirect, slight infringement prior to finding a violation of the right to interstate travel. By proposing that even an *indirect discouragement* of interstate travel, by a sit-in protest, is sufficient to violate this federal right, respondents would grossly expand federal jurisdiction to include any act by two or more persons which even remotely intimidated someone who was considering travelling interstate.

This Court should recognize that the disparate treatment it has uniformly required to state a claim for the unconstitutional interfer

ence with interstate travel is totally absent in this case. The absence of such disparate treatment is reason enough to reverse the judgments below and deny respondents' interstate travel claims.

Finally this Court should refrain from permitting federal courts to resolve these claims with an emotional "abortion über alles" mentality which sweeps away all conflicting reality and with it the pleading and proof requirements of *Griffin* and the important distinctions between federal and state jurisdiction which these requirements protect.

B. Failure To Allege State Action Bars A Federal Claim Based On Interference With Abortion Rights.

It is ironic that the only claim which arguably brings this matter into federal court is alleged interference with the right to travel interstate. This irony stems from the fact that this case deals with a sit-in protest at abortion clinics, yet neither the district court nor the appellate court below found that any abortion rights had been violated. *NOW v. OR*, 726 F. Supp. at 1493 (Pet. App. 31a). This Court should recognize the stretch respondents are asking this Court to make. Rather than stretching the cloth of § 1985(3) to the breaking point, this Court need only redirect respondents' efforts to the proper forum.

It is axiomatic that the right of privacy which is the basis for any claim of interference with abortion rights cannot provide a basis for recover under § 1985(3) where there is no state action involved. This Court has only recognized a right to obtain an abortion free from state interference. *Roe v. Wade*, 410 U.S. 113 (1973).[7] No such state interference is presented in this case.

In *Bowers v. Hardwick*, this Court recognized that the "right of privacy" does not somehow contain rights independent of the language of the Constitution and Bill of Rights itself. The Court recognized that when it is "announcing rights not readily identifiable in the Constitution's text" it must assure the public of something more

[7] Indeed, the continued vitality of *Roe* has been questioned recently by members of this Court. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

"than the imposition of the Justices' own choice of values on the States and the Federal Government." *Bowers*, 478 U.S. at 191-192. This assurance requires that the Court identify "the nature of the rights qualifying for heightened judicial protection" and demonstrate that such rights are either "deeply rooted in this nation's history and tradition" or "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Id.*

As the Court emphasized in *Bowers*:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses [of the 5th and 14th Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Id. at 194.

Such governance is precisely what the courts below have erroneously attempted to do. Such unauthorized expansion of judical authority should not be condoned by this Court.

Application of the foregoing principles compels a reversal of the judgment below. There is nothing private about walking on a public street. This Court has never recognized the alleged class of women seeking abortions as having any fundamental constitutional right against public protest. If there is any right "deeply rooted in this nation's history and tradition," it is the right to demonstrate peacefully against public behavior by private persons which the demonstrators believe is morally wrong and detrimental to public health and safety, even if such demonstrations result in the lawful arrest and conviction of such demonstrators under state law. Liberty and justice will not be sacrificed in this country if respondents are left to the same state court remedies which anyone else may seek for trespass or blocking access to public or private walkways. Liberty

and justice does suffer when the federal judiciary assumes powers which neither the Constitution nor federal law authorizes it to exercise.

CONCLUSION

For all of the reasons set forth above, this Court should find that respondents have failed to show that 42 U.S.C. § 1985(3) has been violated, that petitioners did not have the requisite invidiously discriminatory animus, and that respondents were not members of a class included within the scope of 42 U.S.C. § 1985(3). This Court should also find that respondents' rights to interstate travel were not violated and that no federally cognizable interference with abortion rights took place. Therefore, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and the case remanded to District Court for a dismissal of the federal causes of action.

Respectfully submitted,

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Supreme Court of The United States

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JANE BRAY, et al.,

Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1990

JANE BRAY, et al.,

Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This is not and should not be a case about abortion rights. This case does, nevertheless, present important issues concerning the improper application of the constitutional Right to Interstate Travel to suppress civil dissent generally in the United States. The Fourth Circuit has now blindly joined the Second Circuit[1] in an unprecedented and wholly unjustified expansion of the Right to Interstate Travel to apply to sit-in protests which occur at the site of medical facilities where abortions are performed.

This case arises in the context of political action and public protests, including "Operation Rescue" sit-in demonstrations at abortion sites, as a result of the abortion of many millions of unborn children in the United States since 1973. Petitioners believe that human life is precious. The conception and growth of human life within a mother's womb has been scientifically observed, documented

[1] *New York State N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990).

and described.[2] However, since *Roe v. Wade*, 410 U.S. 113 (1973), thousands of arrests and prosecutions for trespass and other state law violations in connection with such public protests have occurred nationwide. Hundreds have been arrested in the Washington, D.C., area alone.

The United States experienced similar wrenching social upheaval and political division with the civil rights and Vietnam war protests of previous decades.[3] Since this nation's birth, the evident and powerful result of deeply held beliefs by Americans has been political protest and civil dissent. It is certain that abortion is the most divisive public issue of the last two decades,[4] and perhaps the greatest national political and moral question since slavery.

The Rutherford Institute is concerned that a wholly inappropriate and expansive interpretation of the Right to Interstate Travel threatens to embroil the federal courts in the suppression of all future political protest movements, regardless of ideology. Such cases properly belong in the state courts, which are more than able to deal with uncomplicated state tort law issues such as trespass and nuisance.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish divine and Rector at St. Andrew's University. With thirty-five state chapters, three international chapters, and international headquarters in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to the freedom of speech of religious persons. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for

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[2] *New Perspectives on Human Abortion*, Part I, Sec. 2: E., Blechschmidt, M.D., *Human Being from the Very First* (1981).

[3] Lambak, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Pol'y Rev. 472, 480-81 (1987); Barkan, *Protestors on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Anti-war Movements* (1985); Comment, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 Yale L.J. 1520 (1968); Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 Wash. & Lee L. Rev. 77 (Winter 1991).

[4] *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 3079 (1989) (Blackmun, J., dissenting and concurring in part).

amici curiae in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

The Rutherford Institute believes that the sole federal claim of the Respondents, 42 U.S.C. Section 1985(3), premised on the Right to Interstate Travel, must be thrust out of federal court, as it is a "wholly insubstantial and frivolous"[5] federal claim, which deprives the district court of subject matter jurisdiction.

STATEMENT OF FACTS

Amici Curiae adopt by reference the statement of facts set forth in Petitioners' Brief filed with this Court.

SUMMARY OF ARGUMENT

The central dispute of this appeal involves 42 U.S.C. Section 1985(3) (1976 ed., Supp. V) [hereinafter "Section 1985(3)"], also known as the Ku Klux Klan Act of 1871.[6] The subject matter is the misapplication of the Right to Interstate Travel to Petitioners' antiabortion sit-in demonstrations. Clear pronouncement by this Court is critical at this time to clarify the boundaries of the constitutional Right to Interstate Travel in a manner that the lower courts cannot. The strongly worded cautions of this Court in *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*, 463 U.S. 825, 834 (1983) against a transfiguring of Section 1985(3) into a general federal tort law are now being completely ignored by several circuit courts.

The Right to Interstate Travel must not be allowed, through a twisted regime of construction, to be used as a sword to strike against

---

[5] *Bell v. Hood*, 327 U.S. 678, 682-683 (1946).

[6] A *prima facie* case for relief under Section 1985(3) must allege at least four necessary elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Brotherhood of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825, 828-829 (1983) (restating the test first formulated in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)).

civil dissent in the United States.[7] If the decision by the court of appeals is affirmed, this Court will not only needlessly overburden the federal system with essentially state law claims, but it will also further signal that such suppression of dissent is now welcomed in the federal courts.

ARGUMENT

I. The Petitioners' sit-in demonstrations at abortion facilities do not implicate the constitutional Right to Interstate Travel.

Relying on a holding from *Doe v. Bolton*, 410 U.S. 179, 200 (1973), that state residency requirements for abortions are inconsistent with the Privileges and Immunities Clause of the Fourth Amendment, together with a brief reference to the right against private discrimination recognized by the Court in *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971), the court of appeals affirmed the district court holding that the Petitioners' sit-in demonstrations have violated the Respondents' constitutional Right to Interstate Travel. (Petition for Writ of Certiorari Appendix at 30a.).

In holding that private demonstrators violate the constitutional Right to Interstate Travel by impeding access to an abortion facility, the court of appeals has gone well beyond the level of constitutional protection that has heretofore been recognized in this Court's decisions.

As a threshold matter, no Right to Interstate Travel case, factually analogous to Petitioners' sit-in demonstrations, exists.[8] The Right to Interstate Travel has been implicated principally in two contexts.[9] It has most commonly been invoked in cases involving differential

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[7] "If we think of civil disobedience in [a] general way. . . we can say something now that we could not have said three decades ago: that Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community." R. Dworkin, *A Matter of Principle* 105 (1985).

[8] *See also* Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 Neb. L. Rev. 117 (1975); Note, *The Right to Travel — Quest for a Constitutional Source*, 6 Rut. Cam. L.J. 122 (1974).

[9] "The Right to Travel has long been accepted . . . In addition to protecting persons against the erection of actual barriers to interstate movement, the Right to

(footnote continued)

treatment among persons of varying duration of state or local residence. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (availability of free medical service dependent upon length of county residence); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits limited to persons dependent upon length of state residence). These cases are of no avail to Respondents in that Petitioners did not seek to differentiate between residents and non-residents seeking an abortion.

The second application concerns actual, physical travel among the states.[10] This Court has in the past recognized a limited right under Section 1985(3) to be free of private (or state) actions which hinder travel on the public highways. *Griffin v. Breckenridge*, 403 U.S. 88, 106 (1971); *United States v. Guest*, 383 U.S. 745, 758 (1966); *Edwards v. California*, 314 U.S. 160 (1941). "Undoubtedly... the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution." *Williams v. Fear*, 179 U.S. 270, 274 (1900). In first recognizing a constitutional Right to Interstate Travel that is protected against private action, this Court stated that:

> [T]he federal commerce power surely encompasses the movement in *interstate commerce* of persons as well as commodities. . .It is also well settled in our decisions that the federal commerce power authorizes Congress to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in *interstate commerce*.

United States v. Guest, 383 U.S. at 758-59 (citations omitted) (emphasis added). *See Brief for Respondents in Opposition to Petition for*

Travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents."

Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982).

[10] "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

The Passenger Cases, 7 How. 283, 492 (1849), *quoted in Shapiro v. Thompson*, 394 U.S. at 630.

Writ of Certiorari, at 14 (quoting *Guest* in support of "[t]he constitutional Right to Travel from one State to another"). Thus, Congress' authority to legislate against private action in this context is dependent upon the effect of such action on interstate movement. While some portion of those who sought to enter the abortion clinic had travelled from another state (although many others did not), the Court has never applied this constitutional provision in a manner even approaching that of the lower courts in this case. Specifically, the Court's prior decisions have defined the contours of a constitutional Right to Interstate Travel in terms of an intent to hinder, and an actual hindrance of, interstate travel, both of which boundaries are breached by Respondents' expansive arguments.

First, this Court has held that the effect of private actions on interstate travel may not be merely incidental. Rather, Respondents have the burden of proving that "the federal right to interstate travel was one of the rights meant to be discriminatorily impaired by the conspiracy." *Griffin*, 403 U.S. at 106; *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*, 463 U.S. 825, 832-33 (1983) (in *Griffin*, "the conspiracy at issue was actionable because it was aimed at depriving the plaintiff of... the Right to Travel guaranteed by the Federal Constitution"). *See also Guest*, 383 U.S. at 760 (18 U.S.C. Section 241, which is the criminal counterpart of Section 1985(3) regarding violation of Right to Interstate Travel, requires that "the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right").

In *Griffin v. Breckenridge, supra,* certain whites had forcibly stopped an automobile containing "Negro" citizens on a public highway. One of the Negroes, mistakenly believed to be a civil rights worker, was beaten with a club, while the others were allegedly threatened with death and injury and then beaten themselves. Under this factual situation, after detailed analysis of the legislative history of Section 1985 (3), the Court found that the Right to Interstate Travel was subject to "private" interference as well as "governmental," and thus actionable under Section 1985 (3). *Griffin*, 403 U.S. at 98-106. Reversing the Fifth Circuit's affirmation of the district court dismissal, the Court observed that it was "open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so,

that their federal Right to Travel was one of the rights meant to be discriminatorily impaired by the conspiracy." Id. at 106 (emphasis added).

The lower courts' holdings herein, that the Petitioners have violated Respondents' Right to Interstate Travel, are incorrect and unsupported in fact and law. A brief review of the Respondents' claim that Petitioners' sit-in demonstrations are indistinguishable from the actions alleged in *Griffin* shows it to be completely unfounded:

> - *Griffin* involved the act of forcibly blocking travel on a state highway. Rescues occur on public sidewalks in the traditional manner of peaceful civil rights sit-in demonstrations.
>
> - *Griffin* involved detention, the brutal use of deadly force and immediate threats of death and serious injury to halt travel upon a highway. Rescues constitute passive, nonviolent demonstrations to protest the act of abortion at clinics and have nothing to do with free travel on public highways or streets.
>
> - *Griffin* involved violent, *racially class-based animus*, proscribed by law. Rescues involve the intent to nonviolently protest abortion, to protect unborn human life and the mother, which has not been proscribed for purposes of Section 1985(3).
>
> - *Griffin* involved violent, racially based assaults interfering with highway travel and civil rights activity. Rescues involve peaceful First Amendment activity such as display of placards, singing, chanting, counseling and praying, as well as passively blocking the entrance of abortion facilities as a means of protesting the termination of unborn human life.

With respect to the question of racial animus, as related to Section 1985(3) actions, the Court in *Griffin* noted that "the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." *Id.* at 103. In the later case of *United Brotherhood of Carpenters and Joiners, Local 610 v.*

Scott, 463 U.S. 825, 836, dealing with alleged "political" and "economic" animus, the Court noted:

> We are unpersuaded. In the first place, it is a close question whether Section 1985(3) was intended to reach any class based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominate purpose of Section 1985(3) was to combat the prevalent animus against Negroes and their supporters.

Griffin, in applying the Right to Interstate Travel to the context of Section 1985(3), dealt directly with violent, purposeful racial animus. No such animus exists in fact or analogously in this case. Indeed, the intent of Petitioners' sit-in demonstrations is the emancipation of human life.

Respondents argue that "it is enough that out-of-state travel is impeded" for a violation to be established. *Id.* at 15. However, obstruction of an individual *traveller* does not equate with obstruction of interstate *travel*. It is a classic non sequitur to hold, as the lower courts have here, that a person who is *hindered in mere physical movement* from point A (sidewalk) to point B (abortion facility) somewhere within these United States has been denied a constitutional Right to Interstate Travel. The actions of Petitioners in no wise hindered *travel* under any reasonable, coherent, constitutionally acceptable definition of that term.

Further, there can be no doubt that the Petitioners did not have the requisite intent to impede interstate travel or oppress individuals from exercising that right. They were in no way concerned from where those seeking access to the abortion clinic travelled. It was irrelevant for their purposes.[11] Thus, to prevail, Respondents would have this Court expand the Right to Interstate Travel far beyond any existing standard and to hold that the mere obstruction of a building by private individuals, undertaken for the purpose of protesting and persuading others not to perform (in the case of a physician) or undergo (in the

[11] It is clear that Petitioners' sole purpose is to protest abortion. There is no primary intent to interfere with anyone's passage between or through territories.

case of a pregnant woman) a medical procedure, violates the Right to Interstate Travel.

The implications of such a holding are potentially staggering. It would transform the Constitution into a sword that reaches out and strikes conduct that has heretofore been governed by state tort and criminal trespass law. Such an unduly broad reading of the Right to Interstate Travel surely finds no place in the Constitution. In analyzing Petitioners' sit-in demonstrations, Judge Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there is no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[12]

In sum, the Right to Interstate Travel at issue here does not concern the wisdom of the Court's prior abortion decisions, nor does it involve questions of the freedom of protestors to picket. The heart of the matter is the unwarranted enlargement of constitutional protections. As the Court stated in an analogous context, "The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." *Holland v. Illinois*, ___U.S.___,110 S.Ct. 803, 811 (1990). Similarly, rejection of the lower courts' findings of a violation of the Right to Interstate Travel, under these facts, is not an erosion of either the existing right to abortion, or of the freedom from denial of any other civil right, but rather the recognition of the proper bounds of a well-established constitutional doctrine.

The contention that non-violent sit-in demonstrations involving hundreds of volunteers of conscience, gathering to protest abortion, rises to a purposeful constitutional violation of the Right to Interstate Travel, is nothing short of constitutional fiction – legal ambrosia – the quest for a federal cause of action where none exists. The application of the Ku Klux Klan Act via the Right to Interstate Travel against the Petitioners' sit-in demonstrations is an unprincipled legal fiction of technical form and only serves to keep the federal courts embroiled in

[12] *National Abortion Federation v. Operation Rescue*, No. CV 89-1181 (AWT) *slip. op.*, at 7 (C.D. Cal. January 31, 1990)(dismissing amended complaint with prejudice), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990).

abortion litigation in the post-*Webster*[13] era in a manner that was not intended by Congress.

II. The Right to Interstate Travel is a wholly insubstantial federal claim depriving the district court of subject matter jurisdiction.

Respondent's complaint in the district court sought a permanent injunction on four separate grounds — three state law claims (nuisance, trespass, tortious interference with business relationship) and one federal law claim (violation of Section 1985(3)).

In its attorneys' fees opinion, the district court noted that it "was, essentially, a simple trespass case. . . " Petition for Writ of Certiorari Appendix at 46a. The district court granted Respondents relief on three of their claims but denied relief on the tortious interference claim. On appeal, Petitioners contested the propriety of the district court's exercise of pendent jurisdiction over Respondents' state law claims, but in light of its affirmative holding on the federal claim, the court of appeals did not address this point of error. Petition for Writ of Certiorari Appendix at 9a.

Petitioners have renewed their attack on the district court's subject matter jurisdiction in this Court. *See* Question 4 of Petition for Writ of Certiorari. To date, Respondents' argument in support of the district court's subject matter jurisdiction, which allows it to exercise pendent jurisdiction, has consisted of little more than the fact that at least one other federal appeals court has upheld federal claims identical to those asserted here. *New York State N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, __ U.S. __, 110 S.Ct. 2206 (1990). *See also Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990) (curiously upholding exercise of pendent jurisdiction over unappealed state law claims without ruling on the sole and identical federal claim under Section 1985(3)).

The standard for pendent jurisdiction is set forth by this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). *Gibbs* held that federal courts may choose to assume pendent jurisdiction over state law claims only if the federal claim is substantial enough to confer subject matter jurisdiction.

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[13] *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040 (1989).

The Court has since refined this definition by holding that the test is whether the right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70-71 (1978) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974)). *See also Hagans v. Lavine*, 415 U.S. 528, 542-43 (1974).

Respondents' argument as to the substantiality of their federal claim appears to rely solely upon the premise that if a particular federal claim has been upheld by a federal judge, then any other similar federal claims are *a fortiori* substantial. Such a result would hopelessly clog the federal courts with essentially state law claims. All that would be required is for one federal district court judge somewhere in the United States to uphold a federal claim — though the case revolved essentially around significant pendent state law claims. Plaintiffs all over the country would then be free to file similar actions in their respective federal district courts until the initial decision is overturned on appeal, either by this Court or a court of appeals. Given the rapidity with which "copycat" litigation is filed and the often slow pace of appellate review necessitated by overburdened dockets, it is not unrealistic to imagine that dozens of such cases could be filed if the standard Respondents propose prevails. *See* Petition for Writ of Certiorari at 13 n.4.

Quite properly, therefore, the federal courts of appeals have declined to enter the hard and fast rule that Respondents apparently seek and have instead made their own determination of a federal claim's substantiality. In a case strikingly similar to the one at bar, the United States Court of Appeals for the Seventh Circuit reversed injunctions issued by three district court judges under the Social Security Act and pendent state law grounds. The Seventh Circuit held that the relief granted under federal law should be reversed given its recent decision in another case, and that the federal claims were not substantial enough to have allowed the lower courts to properly exercise pendent jurisdiction over the state law claims. *Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072, 1081, 1087 (7th Cir.), *cert. denied*, 459 U.S. 1202 (1982). The court of appeals reached this conclusion notwithstanding the fact that the precedent it relied upon, *Northlake Community Hospital v. United*

States, 654 F.2d 1234, 1239 & n.6 (7th Cir. 1981), was not in accord with the holdings of other circuits.

Similarly, other courts of appeals have held a federal claim too insubstantial to support the exercise of pendent jurisdiction notwithstanding the fact that the district court had found the claim not only to be substantial but had upheld relief under the federal claim. For example, in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), the Second Circuit held that a federal RICO claim was insubstantial notwithstanding the dissent of one member of the panel and the fact that the district court had found federal jurisdiction properly invoked and had granted a preliminary injunction on state law grounds. *Id.* at 104. There, the court of appeals harshly rejected the frivolous application of the federal anti-racketeering laws (18 U.S.C. Section 1961, *et seq.*) to Operation Rescue sit-in demonstrations at abortion facilities.

The Town of West Hartford had alleged that the demonstrations were predicate acts within the purview of the Hobbs Act (18 U.S.C. Section 1951) prohibiting criminal extortion. The court stated: "This theory is . . . untenable. . . . So bizarre a construction of the Hobbs Act affronts common sense, much less the rule of lenity." *Id.* at 102. The court of appeals also refused to apply civil RICO in an overly expansive manner as "civil RICO liability does not extend to deterring any illegal act . . . for which there are state and common law remedies." *Id.* at 104 (citations omitted). The court would not "countenance fanciful invocations of the draconian RICO weapon in civil litigation." *Id.*

The Respondents' Right to Interstate Travel claim is no less fanciful or unnecessary given the district court's admission that the claim was "essentially a simple trespass action" which has ample redress in the state courts. This Court must not allow wrongful interpretation of the Right to Travel to transform Section 1985(3) into the "general federal tort law" warned against in *Scott*, 463 U.S. at 834. *See also Bolden v. Alston*, 810 F.2d 353, 358 (2d Cir.), *cert. denied*, 484 U.S. 896 (1987) (reversing district court finding in favor of plaintiffs on federal claim and dismissing pendent state law claims because federal claim was insubstantial); *Lechtner v. Brownyard*, 679 F.2d 322 (3d Cir. 1982) (reversing jury verdict on federal and state

law claims because federal claim should have been dismissed by the district judge and was too insubstantial to support pendent state law claims).[14]

Judged then on its own merits, without the presumption of validity that Respondents so eagerly seek, Respondents' federal claim based on the Right to Interstate Travel is not substantial and could not confer authority upon the district court to exercise pendent jurisdiction over Respondents' state law claims.

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[14] Even if this Court were to find Respondents' federal claim sufficient for the discretionary exercise of pendent jurisdiction, it should remand the case to the court of appeals so that it may decide Petitioners' claim that the district court abused its discretion in exercising pendent jurisdiction over the state law claims. *See Ridenour v. Andrews Federal Credit Union*, 897 F.2d 715, 7122-23 (4th Cir. 1990) (where federal claim, which was substantial enough to invoke federal jurisdiction, is dismissed on its merits, district court should likewise exercise discretion to dismiss pendent state law claims absent "unusual circumstances").

CONCLUSION

The sole federal claim of the Respondents, 42 U.S.C. Section 1985(3), rises and falls entirely upon this Court's construction of the constitutional Right to Interstate Travel. The bizarre and fanciful nature of Respondents' Right to Travel claim is manifest after careful scrutiny divorced from the vicissitudes of the abortion issue. Being insubstantial in a jurisdictional sense, this Court should reverse the court of appeals and send the Respondents' claims into state court where they properly belong.

Respectfully submitted,

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ALEXANDRIA WOMEN'S HEALTH CLINIC, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

I. WHETHER 42 U.S.C. § 1985(3) AS ENACTED IN 1871 WAS INTENDED TO APPLY TO ANY CLASS OF PERSONS COMING WITHIN ITS PURVIEW WHERE STATE AND LOCAL AUTHORITIES ARE AFFORDING SUCH CLASS ADEQUATE PROTECTION OF THEIR CIVIL RIGHTS?

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No. 90-985

In The

Supreme Court of the United States

October Term, 1990

JAYNE BRAY, et al.,

Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, et al.,

Respondents.[1]

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

Concerned Women for America ("CWA") is a national, non-profit membership organization representing approximately 700,000 people. CWA's purpose is as follows:

[1] Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.3.

> The purpose of CWA is to preserve, protect and promote traditional and Judaeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

One of the foremost concerns and desires of CWA is to protect the lives of the unborn. CWA is also concerned with the increasing federal intervention in matters which lie with the province of the individual states.

STATEMENT OF THE CASE

Amicus Curiae adopts the factual presentation set forth in Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

The legislative history surrounding the passage of the Ku Klux Klan Act establishes that an indispensable element for the application of § 1985(3) is the inability or unwillingness of the states to protect the rights of a particular class of their citizenry. If the states are affording their citizens adequate protection, § 1985(3) may not be used to invoke federal action. Both th Commonwealth of Virginia and the states throughout the Union generally are providing women who seek abortions all the protection they require in exercising the rights which they claim in that regard. Since § 1985(3) precludes federal interference except where the states have clearly and

persistently failed to act, it follows that federal intermeddling in instances such as that presented in the present case is unwarranted.

ARGUMENT

INTRODUCTION

42 U.S.C. § 1985(3) is an important legislative tool for use in combating conspiracies of insurrection against legitimate government authority. The scope of § 1985(3) was expressed by Congress when enacting its predecessor, the Civil Rights Act of 1871, otherwise known as the "Ku Klux Klan Act." As this Court stated in *Griffin v. Breckenridge*, 403 U.S. 88, 96 (1971), the meaning of § 1985(3) and what the statute encompasses "is confirmed by judicial construction of related laws, by the structural setting of § 1985(3) itself, and by its legislative history."

It is necessary carefully to analyze the historical genesis of § 1985(3) and to review closely Congress's intent in enacting it so as to guard against the error of concluding that it creates a federal tort law where none previously existed. *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983) (*"Carpenters"*). In *Carpenters*, this Court found "that the bill did not provide a federal remedy for 'all tortious, conspiratorial interferences with the rights of others.' " 463 U.S. at 834 (citations omitted). In *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971), this Court was careful to point out that the statute is not meant to apply to "all tortious, conspiratorial interferences with the rights of others" and must not become a "general federal tort law." However,

§ 1985(3) does become a general federal tort law if all that is required to invoke it is an allegation in federal court that there exists a possibility that a group of people will be deprived of civil rights.

The legislative history of § 1985(3) shows that Congress was concerned about the lawlessness in the post-bellum South and enacted the Ku Klux Klan Act as a means of enforcing civil rights where the Southern States would not.[2] Additionally, Congress was looking to control specific white groups who were terrorizing blacks and their supporters. Essentially, § 1985(3) was an answer to the insurrectionary states resisting reconstruction. It was a statutory mechanism invoked only under the dire circumstances where a state could or would no longer protect the rights of its citizens.

The lack of state enforcement to protect civil rights, which triggers this statute into action, is lacking in this case. The Commonwealth of Virginia has not dissembled into a lawless anarchy threatening the existence of the Union. Neither are Virginia's courts or police unwilling to or incapable of enforcing the state trespass laws (or any other state statutory controls at their disposal) against Operation Rescue. Nor does Operation Rescue threaten the Commonwealth of Virginia with insurrection. Therefore, § 1985(3) was improperly invoked by the federal district court to assume jurisdiction over this case.

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[2] *See* Cong. Globe, 42d Cong., 1st Sess, at app. 153 (1871) (remarks of Rep. Garfield) (supporting provision in the Civil Rights Act of 1871 ensuring equal protection to black suffrage supporters when Southern States are unable or unwilling to control interference with the administration of laws.)

Before the Fourteenth Amendment was drafted and adopted, Congress recognized the need for immediate legislation to protect and extend the rights of newly-freed slaves.[3] The Civil Rights Act of 1871 was enacted by the Forty-second Congress in response to a reign of terror and destruction by the Ku Klux Klan in the Southern States.[4]

This reign of terror fell not only upon blacks, but also upon those who supported reconstruction. Republican officeholders were in particular danger of the Klan's terrorism. Senator Osborn, for example, cited cases of the assassinations within a single year of two successive clerks of the Court of Jackson County, Florida, both of whom were Republicans. In addition to these two, Osborn asserted, "seventy two others have fallen by assassination in the same county, all Republicans, and yet

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[3] *See e.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

[4] "There can be no doubt that the Klan and other secret societies were guilty of innumerable crimes and that their secrecy was often a cloak for lawlessness and outrages directed against blacks and even recalcitrant whites. Thus, the Ku Klux Klan investigation of 1871 reported 153 blacks murdered in a single Florida county that year; over 300 murdered in parishes outside New Orleans; bloody race riots in Mississippi and Louisiana; a reign of terror in parts of Arkansas; in Texas, 'murders, robberies and outrages of all kinds.' " 2 S. Morrison & H. Commanger, *The Growth of the American Republic* 46 (5th ed. 1962), quoted in Note, *The Reach of 42 U.S.C. § 1985(3): Sex Discrimination as a Gauge*, 25 Clev. St. L. Rev. 331, 332 (1976). The other secret organizations included the Knights of the White Camelia, the White Brotherhood, and the Pale Faces. Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 U. Chi. L. Rev. 402, 407-08 (1979).

no criminal has been punished for this slaughter." Cong. Globe, 42d Cong., 1st Sess., at 654 (1871).

Because of the "southern outrages," the second section of the Ku Klux Klan Act as originally proposed provided criminal sanctions for conspiracies to commit certain crimes which denied a person his rights, privileges and immunities under the Constitution or laws of the United States.[5] The Forty-second Congress was so concerned with possible conspiracies to overthrow legitimate authorities and reconstructionist policies that sections 3 and 4 of the original Act provided for the extraordinary remedy of martial law and suspension of the writ of habeas corpus to avert them. 17 Stat. 14, §§ 3, 4 (1871).

The scope of activities proscribed by the statute is suggested by the conspiratorial acts enumerated in section 2 of the original Act. These included conspiracies to overthrow or oppose by force the government of the United States, to seize United States property, to injure United States officials on account of or during the discharge of their duties, to deter witnesses or jurors from performing their functions, to hinder the course of justice in state or territorial courts, or to injure any person for enforcing the equal protection of the laws. 17 Stat. 14 § 2 (1871). Although § 1985(3) does not include all these specific offenses, the full range of conspiracies prohibited by the 1871 Act taken as a whole illuminates the original tenor of the language codified in the current statute. That *all* such conduct giving rise to civil liability under the

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[5] Cong. Globe, *supra* note 2, at 317.

original section 2 also subjected the conspirators to severe criminal sanctions[6] is even more suggestive of the intended scope of the provision to be an extreme response to a drastic situation.

To find that § 1985(3) may be used to prevent abortion protest trespass is to ignore the historical context of this statute and what it was meant to remedy. It is a statutory remedy for federal intervention in a state emergency. Permitting federal intervention without the requisite state emergency under § 1985(3) gives the federal government a power which Congress never intended it to have.

A. THE FEDERAL GOVERNMENT IS ONLY TO BECOME INVOLVED UNDER § 1985(3) WHEN A STATE IS NO LONGER ABLE TO PROTECT THE CIVIL RIGHTS OF ITS CITIZENS

1. Insurrection During Reconstruction Was the Focus of the Statute

The mechanism which puts the statutory vehicle of § 1985(3) into motion is a state government which is unwilling or unable to enforce laws which protect the civil rights of its citizens. Because of the immediacy of the insurrection in the South, President Grant personally

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[6] Section 2 of the Act provided for fines of between $500 and $5,000, or imprisonment of between six months and six years or both. 17 Stat. 13 § 2 (1871).

requested prompt introduction in the House of the Ku Klux Klan Act.[7] The President's message read:

> To the Senate and House of Representatives: A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. *That the power to correct these evils is beyond the control of the State authorities I do not doubt*: that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently urge such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, *and the enforcement of law in all parts of the United States*. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject upon which I would recommend legislation during the present session.

Cong. Globe, 42nd Cong., 1st Sess., at 236 (Senate); *Id*, at 244 (House) (emphasis added).[8] This message makes it clear that President Grant was concerned about ineffective state governments which were unable to secure the civil rights of their citizens because of Klan domination.

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[7] Act of April 20, 1871, ch.22, 17 Stat. 13. *See also* A. Avins, *The Reconstruction Amendments' Debates* (1967).

[8] The House passed a resolution that the message be referred to a select committee of nine members, who then reported H.R. 320 to the House for consideration. Cong. Globe, *supra* note 2, at 249, 317.

His recommendation that the Act expire after a year shows that he perceived the southern outrages to be an emergency situation which called for immediate, but temporary, federal intervention to assert control over a lawless state of affairs.

The Congressional Globe is replete with statements from Congressmen regarding conditions in the South. With regard to these conditions Congressman Tyner's remarks are typical:

> "In a large portion of the states lately in rebellion there is a condition of practical and positive insurrection. The courts are closed, juries intimidated or in complicity with the enemies of the government, the laws are silent, officers of justice overawed and the very genius of lawlessness and misrule triumph."

Cong. Globe, 42nd Cong., 1st Sess, at 487.

Section 1985(3) was envisioned as a statute to prevent the Klan from usurping legitimate government offices and authority. Republican Senator Osborn of Florida, for example, stated the Klan's "well defined and proven object is to gain political control by intimidation and murder." Cong. Globe, 42 Cong., 1st Sess., at 653. Republican Congressman Wilson of Indiana also stated in this vein: "And, sir, what is the purpose of this bloody work? I assert . . . that it is for the express purpose of controlling governments in the States." *Id*. at 484.

Therefore, § 1985(3) was never intended to be a statute to prevent protesters from sitting on the grounds of abortion facilities. Instead, it was designed to prevent the lawless domination of state officials and state

governments.[9] The sponsors of the Ku Klux Klan Act believed that the ultimate goal of the Klan's usurpation of power through terror and political subversion was to overthrow reconstruction policy, including the recent amendments to the Constitution, thereby withdrawing from the freedmen the equal protection of the laws and the equal privileges and immunities which that policy secured.[10] In the final speech before the Ku Klux Klan Act was first approved by the House, the sponsor of the bill, Congressman Shellabarger, outlined the Klan's long-range plans:

> Mr. Speaker, that I may make absolutely and utterly irresistible the proofs that these banded conspirators have the political aims I attribute to them, to wit, to 'trample into dust' these newly-acquired political rights of the freed man and

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[9] *See e.g.*, Cong. Globe, *supra* note 2. at 487 ("disorders are so great in some of the States as to paralyze the power of local authorities") (remarks of Congressman Tyner (R-Ind)); *id*. app. at 72 ("the Klans are powerful enough to defy the state authorities. . . . The states are prostrate before a power they cannot control") (remarks of Congressman Blair (R-Mich)); *id*. app. at 196 ("even now they are so powerful as to control State authority and prevent the execution of laws") (remarks of Congressman Snyder (R-Ark)).

[10] *See e.g.*, Cong. Globe, *supra* note 2, at 252 (remarks of Sen. Morton) ("The purpose [of the Klan] is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or to flee the State."); *id*. at 504 (remarks of Sen. Pratt) (the primary purpose of the Klan "is to punish men for their political opinions"); *id*. at 702 (remarks of Sen. Edmunds) (the "systematic plan [of the Klan] is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter").

> the constitutions and laws which confer them. I now call new and distinguished witnesses. Take this one first, that the Democratic party of this nation, 4th July, 1868, in national platform formally and solemnly announced . . . that 'we regard the reconstruction acts (so called) of Congress, as such, as usurpations and unconstitutional, revolutionary, and void.'

Cong. Globe, 42d Cong., 1st Sess., at 517 (1871).[11] Similarly, Congressman Coburn noted that the records of the War Department indicated that governors of eight states called for federal troops between 1868 and 1870 as a result of the states' inability to protect their citizens from violence. *Id*. at 457.

It is only in those situations where mass disorder threatens the very structure of a state that § 1985(3) allows federal intervention. An Operation Rescue demonstration simply does not threaten a state with the widespread and uncontrolled violence which is required for federal intervention under the statute.

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[11] *See also* Congressman Shellabarger's entire speech, Cong. Globe, *supra* note 2, at 516-519; *id*. at 195 ("It seeks to strike down your reconstruction laws and reduce the newly enfranchised race to a non-voting population.") (Remarks of Congressman Buckley (R-Ala)); *id*. app. at 201 (object of the Klan is the "overthrow of the whole system of reconstruction") (remarks of Congressman Snyder (R-Ark)). This view is corroborated by the testimony of the Democrats themselves: "No, sir; if lawlessness exists it results from the government set over them: it is the legitimate offspring of reconstruction." *Id*. at 421 (remarks of congressman Winchester (D-Ky)). Most historians support the Republicans' perception. *See e.g.* D. Chalmers, *Hooded Americanism* 10-21 (1965); J.H. Franklin, *Reconstruction* (1961).

2. Federal Intervention Was Only Viewed as Viable Under § 1985(3) When a State Is Unable to Secure the Rights of Its Citizens

The Ku Klux Klan Act was envisioned by its supporters to be an emergency mechanism to restore order and justice to an unruly South. Most supporters of the original bill, despite the proposed criminal sanctions contained within it, argued that the source of federal authority lay in the *de facto* denial of equal protection resulting from the failure of the Southern States to enforce the law against the Klan. The remarks of Congressman Blair stress this point:

> The courts are powerless to redress these wrongs, and the State governments fail to afford protection to the people. The Klans are powerful enough to defy the State authorities. In many instances they are the state authorities. And if you deny the General Government the authority to interfere, then there is no remedy anywhere. To wait until the State calls for assistance is to wait, in many instances, for a voice from the grave. The States are prostrate before a power they cannot control.

Cong. Globe App. at 72. Congressman Perry emphasized that:

> The domestic violence here provided for is obviously violence of a nature hostile to the State government. But if the violence be unlawful, and not hostile to the State government; if the State authorities be in complicity with it; if it be against the rights secured by the constitution and laws of the United States, it is, of course, not merely domestic to the State, but hostile to the power of the Federal Government, and in the nature of insurrection or rebellion.

Cong. Globe App. at 79. *See also* (remarks of Congressman Lowe) Cong. Globe at 375, (remarks of Congressman Beatty) *id*. at 428-429, (remarks of Congressman Butler) *id*. at 448, (remarks of Congressman Coburn) *id*. at 459. Typical is the statement of Rep. Hoar that "[t]o authorize the interference of congress there must be, not merely those imperfections and failures in the administration of law which are attendant upon all civil governments alike, but there must be a clear case of denial of government." Cong. Globe at 334.

There has been no denial of protection of civil rights on the part of the Commonwealth of Virginia in this case. Nor has there been a threat that State officials would be unwilling to issue an injunction to stop unlawful protest, or unable to enforce the state's laws. Stated simply, there has been no basis upon which to invoke the drastic statutory mechanism of § 1985(3).

The severely circumscribed conditions justifying invocation of § 1985(3) was voiced by moderate Republican Congressmen who believed that the original draft of the Ku Klux Klan Act went too far in legislating matters within the exclusive province of the states. Congressman (later President) Garfield said in this regard:

> Now, Mr. Speaker, I call the attention of the House to the third section of the bill, I am not clear as to the intention of the committee, but if I understand the language correctly, this section proposes to punish citizens of the United States for violating State laws. If this be the meaning of the provision, then whenever any person violates a State law the United States may assume jurisdiction of his offense. This would virtually abolish the administration of justice under State law. In so far as this section punishes persons who under color of any State law shall deny or

> refuse to others the equal protection of the laws I give it my cheerful support; *but when we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority.*

Cong. Globe at 154 (emphasis added). Congressman Cook, whom Congressman Shellabarger credited with drafting the "equal protection" language of section 2 of the Ku Klux Klan Act, reinforced the notion that the Act was not intended to circumvent a state's authority unless egregious circumstances existed:

> I think it is within the power of Congress to protect and enforce every right secured to American citizens by the Constitution of the United States. I do not believe, and I do not know of any man who does believe, in the language of the gentleman who just addressed the House, that congress has a right to punish an assault and battery when committed by two or more persons within a State. *I know of no one who believes that Congress has any right to enforce the laws of a State except in the emergency contemplated in the Constitution, when the State may be unable to do so by reason of lawless combinations too strong for the State authorities to suppress. The statement that this bill aims at any such end is an utter misstatement of its object and effect.* The proposition we maintain is that whenever the Constitution of the United States secures a right to a citizen Congress may enforce and protect that right.

Cong. Globe at 485 (emphasis added).[12] When the amendment to section 2 to the Ku Klux Klan Act was proposed,

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[12] Congressman Cook clarified this point in a dialogue with Congressman Eldridge, a Democrat from Wisconsin:

(Continued on following page)

Republicans who had opposed the original draft expressed their support for the amendment and repeated their understanding that the Ku Klux Klan Act is only operative in those situations where a state can no longer secure the rights of its citizens. Congressman Willard said in this regard:

> The internal affairs of a State, its police regulations, *and all laws for the protection of society or the person and property of individuals against lawless violence, are matters of State concern, and entirely outside of any powers conferred upon the General Government.* Certain specified crimes, as treason and counterfeiting and offenses against the laws of the United States, the General Government has jurisdiction of and can punish; but it can no more punish offenses against life and property, as such, than it can regulate the distribution of property of estates, the enforcement of civil contracts, the matters of taxation, or proceedings in courts in the States. *The individual, for all purposes except for the purpose of carrying into effect the Constitution of the United States and the laws in pursuance thereof, looks to the State Government for protection, and can have it nowhere else;* and in the minds of those who framed the Constitution probably no belief was firmer than that for all time it was much safer to leave the states to

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(Continued from previous page)

Mr. Eldridge. Suppose two men should inspire to commit an assault and battery on a person, or to take away any of his rights of property or liberty, can the United States redress that wrong?

Mr. Cook. Only in case the emergency has arisen, contemplated in the Constitution, in which the aid of the national Government may be invoked in aid of State laws. [Cong. Globe, *supra* note 1, 485]

> protect the rights of the people than to place that duty upon the General Government. I believe that in this they were especially wise; but whether wise or not, I have no doubt that they had that opinion and made the Constitution to conform to it.

Cong. Globe at 187 (emphasis added). Congressman Buchard announced his support of the Act based on the understanding that there must initially be a showing of a lack of justice at the state level prior to federal intervention under the Act:

> That Amendment obviates in a great measure the objections and the doubtful construction as to the extent of jurisdiction for the punishment of crimes intended by the bill. It is not denial of protection but of equality of protection, which constitutes the offense against the United States. *The conspiracies it seeks to punish are those designed to prevent the equal and impartial administration of justice.* These are essentially different from combinations and conspiracies to resist the execution of ordinary process. They must be aimed to prevent the enjoyment of equal civil rights. *The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equal protection.* It is this view that this legislation is competent. The civil rights and enforcement bills heretofore passed provided for the punishment of those laws of a State in conflict with the constitution of the United States. Is not an individual acting as a State officer, upon whom, as such officer, the constitution and laws of the United States impose the performance of those duties, also amenable to the laws of the United States for their nonperformance? If the refusal of a State officer, acting for the State, to accord equality of civil

> rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable.

Cong. Globe App. at 315. Congressman Poland, as well, expressed his opposition to the original bill and his support for the amended version as meeting constitutional standards because its provisions could only be invoked in extraordinary circumstances of state lawlessness:

> [T]he last clause of the fourteenth amendment provides that no state shall deny the equal protection of the laws to its citizens. Now, in my judgment, that is a constitutional enactment that each State shall afford to its citizens the equal protection of the laws. *I cannot agree with several gentlemen upon my side of the House who insist that if the State authorities fail to punish crime committed in the State therefore the United States may step in and by a law of Congress provide for punishing that offense; I do not agree with those gentlemen.*
>
> *But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to stay and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States;* that the Constitution does empower us to aid in carrying out this injunction, which by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens.

Cong. Globe at 514 (emphasis added).

In sum, a § 1985(3) enforcement mechanism becomes operative only when a state is unable or unwilling to enforce civil rights on its own. As Senator Frelinghuysen

said before the Joint Committee on Southern Disorders: "[t]he Federal Government should only interfere to protect the citizen of the United States in his privileges when the State clearly and persistently fails to do so." Cong. Globe at 501. No such chain of events warranting federal intermeddling in a purely state affair occurred in the present case.

B. BOTH VIRGINIA AND THE SEVERAL STATES OF THE UNION GENERALLY ARE ACTING TO PROTECT SUCH RIGHTS AS WOMEN SEEKING ABORTIONS CLAIM TO HAVE SUFFICIENT TO PRECLUDE INVOCATION OF § 1985(3).

Unlike the situation that existed in the South in 1871, state and local authorities in Virginia have not absolutely failed nor have they shown an inability to protect their citizens and to insure them the free and unrestrained exercise of their civil rights. Neither the Commonwealth of Virginia, nor for that matter, any state of the Union, is today seething in lawlessness, ruled by marauding bands of terrorists, or plagued by widespread killings of its public officials. Thus, the indispensable prerequisite triggering the operation of § 1985(3) simply does not exist. That such state inaction is the *sine qua non* to invocation of § 1985(3) was recognized by Justice Blackmun in his dissenting opinion in *Carpenters, supra,* where, joined by Justices O'Connor, Brennan and Marshall, he wrote that:

> The critical consideration is the 42d Congress' perception that the atrocities perpetrated by the Klan were injuring persons who, largely because of their political affiliation, were unable to demand protection from local law enforcement officials.

463 U.S. 825, 853 (1983).

The evidence adduced in the district court reflects that Virginia law enforcement authorities acted promptly and vigorously to provide Respondents with all the protection in the exercise of their civil rights to which they claimed they were entitled. As the record reflects, 387 pro-life demonstrators were arrested during three separate rescue operations at the Commonwealth Women's Clinic through the combined efforts of five law enforcement agencies which included the Falls Church Police Department, the Arlington County Sheriff's Department, the Arlington County Police Department, the Virginia State Police and the Virginia Department of Corrections. At the largest demonstration, approximately 240 demonstrators were arrested and charged with trespass and unlawful assembly. The arrest process consumed two and half hours at the scene during which the clinic was closed for between thirty to forty-five minutes. (Tr. 49-54). It can hardly be suggested that such a massive law enforcement response resulting in the arrest of nearly four hundred persons for alleged violations of state laws is indicative of the complete failure of state and local law enforcement authorities to act in a manner sufficient to invoke the provisions of § 1985(3).

The actions taken by state and local law enforcement officials in this case are typical of the actions taken by law enforcement officials throughout the Commonwealth of Virginia. In fact, these actions are typical of law enforcement officials nationwide. Throughout the country, pro-life demonstrators have been arrested, sentenced to jail, and fined. *See People v. Smith,* 514 N.E.2d 211 (Ill.App. 1987) (pro-life activist convicted of criminal trespass); *People v. Krizk,* 416 N.E.2d 36 (Ill.App. 1981) (pro-life

activists convicted of criminal trespass); *Commonwealth v. Wall*, 539 A.2d 1325 (Pa.Super. 1988) (pro-life activists convicted of criminal trespass and defiant trespass; one defendant sentenced to not less than six nor more than twelve months in prison); *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981) (pro-life activists convicted of criminal trespass); *Crabb v. State*, 754 S.W.2d 742 (Tex.Crim.App. 1988) (pro-life activists convicted of criminal trespass; one defendant sentenced to 90 days in jail and fined $200.00, and five sentenced to 180 days in jail and fined $900.00 each); *City of St. Louis v. Klocker*, 637 S.W.2d 174 (Mo.App. 1982) (pro-life activists convicted of trespass and fined $50.00 each); *Hoffart v. State*, 686 S.W.2d 259 (Tex.Crim.App. 1985) (pro-life activists convicted of criminal trespass, sentenced to 30 days in jail, and fined $500.00); *Erlandson v. State*, 763 S.W.2d 845 (Tex.Crim.App. 1988) (pro-life activists convicted of criminal trespass, sentenced to 180 days in jail and fined $500.00 each); *Reproductive Health Services v. Lee*, 660 S.W.2d 330 (Mo.App. 1983); *Bobo v. State*, 757 S.W.2d 58 (Tex.Crim.App. 1988) (pro-life activists convicted of criminal trespass, received jail sentences ranging from 90 to 180 days, and fined in amounts ranging from $650.00 to $1,000.00); *Brown v. Davis*, 495 A.2d 900 (N.J.Super.Ct. 1984) (pro-life activists arrested and charged with criminal trespass; efforts to enjoin prosecution denied); *State v. Migliorina*, 442 N.W.2d 36 (Wis. 1989) (pro-life activist convicted of criminal trespass); *Gaetano v. United States*, 406 A.2d 1291 (D.C.App. 1979) (pro-life activists convicted of criminal trespass).

In addition to the imposition of criminal sanctions, state courts have entered injunctions against pro-life

activists by placing restrictions upon their right to demonstrate outside abortion facilities. *See Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564 (Tex.Ct.App. 1987); *Kugler v. Ryan*, 682 S.W.2d 47 (Mo.App. 1984); *Chico Feminist's Women's H. Ctr. v. Scully*, 256 Cal.Rptr. 194 (Cal.App. 1989); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 556 N.E.2d 156, *reh'g denied*, 558 N.E.2d 61 (Ohio 1990); *Crozer Chester Medical Ctr. v. May*, 506 A.2d 1377 (Pa.Super. 1986); *Planned Parenthood of Monmouth County v. Cannizzaro*, 526 A.2d 741 (N.J.Super.Ct.App. 1987), *aff'g*, 499 A.2d 535 (N.J.Super.Ch. 1985); *Bering v. SHARE*, 721 P.2d 918 (Wash. 1986); *Family Way Family Physicians, Inc. v. Tacoma Stands Up For Life*, 721 P.2d 946 (Wash. 1986); *Planned Parenthood League of Mass. v. Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990); *Hirsh v. City of Atlanta*, No. S90A1387, S90A1494 (Ga.Mar. 15, 1991); *Dayton Women's H. Ctr. v. Enix*, 556 N.E.2d 956, *reh'g denied*, 558 N.E.2d 61 (Ohio 1990); *Parkmed Co. v. Pro-life Counseling, Inc.*, 442 N.Y.S.2d 396, *modified*, 457 N.Y.S.2d 27 (Sup.Ct. 1982); *O.B.G.Y.N. Ass'n. v. Birthright of Brooklyn and Queens, Inc.*, 407 N.Y.S.2d 903 (Sup.Ct.App.Dis. 1982); Unreported Cases, *Women's Medical Center of Providence, Inc. v. Barry*, No. 86-1964 (R.I.Sup.Ct.Aug. 18, 1987), *remanded*, 551 A.2d 14 (R.I. 1988); *Women's Health Center of West Virginia, Inc. v. Kopp*, No. 90-C-375 (W.Va.Circ.Ct.Feb. 2, 1990); *Planned Parenthood of Santa Barbara, Ventura and San Luis Obispo Counties, Inc. v. Aakus*, No. 178746 (Cal.Sup.Ct.Feb. 23, 1990).

It is thus abundantly clear that law enforcement officials and state courts across the country are acting effectively to insure that such rights as women wishing

abortions claim to have are more than adequately protected. Indeed, at least two states, Maryland and Wisconsin, have enacted trespass statutes specifically aimed at medical facilities and containing penalties providing for both jail sentences and fines. The widespread mob violence, lawlessness, and rebellion which prompted Congress to act one hundred twenty years ago in the enactment of the Ku Klux Klan Act is absent today. Regardless of the claimed right, Respondents have no basis to argue that their beliefs or associations place them in danger of not receiving the equal protection of the laws from local authorities. *See, Carpenters*, at 853 (Blackmun, J. dissenting).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANE BRAY, OPERATION RESCUE, *et al.*
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., (LDF) is a non-profit corporation established to assist African Americans in securing their constitutional and civil rights. LDF has litigated civil rights issues in federal court since 1941, relying in many instances on the Reconstruction-era civil rights statutes. LDF seeks to ensure the continued vitality of 42 U.S.C. § 1985(3). The statute protects civil rights lawyers and other advocates who travel from state to state in the struggle for racial equality. It also guarantees that the legal rights of a minority, even when opposed and resented by the majority, will not be nullified at the will of a mob.

LDF supports the rights of women to reproductive health services, including access to abortion and abortion counseling. Most clinics affected by the injunction in this case serve Medicaid patients and have sliding fee schedules for low income women. Because of disproportionately high poverty rates among African Americans, many African American women in the northern Virginia area would not receive necessary reproductive health services if the clinics were closed by blockades.

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BRIEF FOR NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AMICUS CURIAE IN SUPPORT OF RESPONDENTS

SUMMARY OF ARGUMENT

Two separate substantive clauses of 42 U.S.C. § 1985(3) prohibit the conspiracy of the defendants in this case. The first clause — the "private deprivation clause" — forbids purely private conspiracies, motivated by invidious animus, that deprive persons of constitutional rights. Operation Rescue violated that clause by conspiring with

gender animus to deprive women of their constitutional right to travel. The second applicable clause of § 1985(3) — the "hindrance of the state clause" — forbids conspiracies that purposefully hinder the state's ability to secure equal protection of the laws in order to deprive persons of constitutional rights. Operation Rescue also violated that clause, and it is this second type of violation which is the focus of this brief.

Operation Rescue violated the hindrance of the state clause of section 1985(3) by summoning hundreds of demonstrators to crowd tightly around the plaintiff clinics, purposefully outnumbering and refusing to cooperate with the police, in order to prevent the police from securing plaintiffs' access to the clinics, thereby depriving plaintiffs of their constitutional right to abortion. In forming these blockades, defendants acted upon the state in precisely the manner prohibited by the hindrance clause. Because hindrance involves the state, the hindrance clause remedies constitutional rights guaranteed against state infringement, such as the plaintiffs' right to abortion.

Unlike claims under the private deprivation clause of § 1985(3), claims under the hindrance clause need not

include proof of invidious class animus. All persons are entitled to equal protection of state law without regard to whether they belong to a group that is otherwise granted heightened constitutional or statutory protection. Moreover, even if class animus is required, Operation Rescue's anti-abortion efforts clearly amount to animus against women. The close nexus between women's reproductive capacity and their gender identity has led Congress and this Court in other contexts to recognize discrimination based on reproductive capacity as sex discrimination. It would be consistent with the purposes of the statute to hold that Operation Rescue's class animus against women seeking abortions is prohibited by § 1985(3) as well.

ARGUMENT

INTRODUCTION

At issue in this case is the illegality under 42 U.S.C. § 1985(3) of blockades orchestrated by Operation Rescue during which mobs of people, often numbering in the hundreds, physically prevent women from entering or leaving reproductive health clinics and purposefully frustrate local police efforts to secure access to the clinics. Both the district court and the court of appeals properly held that such blockades violate § 1985(3) as interpreted in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), and Respondents largely rely on the theory of *Griffin* in their brief urging affirmance. *Amicus* agrees that this Court should affirm on the basis of *Griffin*, because a conspiracy to block women from entering clinics to have abortions, like the conspiracy in *Griffin* to stop African Americans on a public road and beat them, deprives plaintiffs of their right to travel in violation of § 1985(3).

Amicus submits this brief, however, in order to elaborate an additional ground upon which Respondents urge affirmance. *See* Respondents' Brief, Point II.B. The second clause of § 1985(3), which was not applicable in *Griffin*,

specifically prohibits conspiracies like Operation Rescue's which *hinder local law enforcement*. Thus, if this Court disagrees that affirmance is required under the first clause of § 1985(3), it should nonetheless affirm for independent reasons under the second clause.

The first two clauses of § 1985(3), although similarly worded, address distinct forms of illegal conspiracy, *both* of which occurred in this case, but only the *first* of which was at issue in *Griffin* and this Court's other post-*Griffin* § 1985(3) cases. The first clause of § 1985(3) — the "private deprivation clause" — prohibits conspiring

> for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States.

Defendants in this case conspired to deprive plaintiffs of their travel rights in violation of this clause. They also, however, prevented the police from securing access to the clinics, and thereby hindered state authorities from securing equal protection, in violation of the second clause of § 1985(3) — the "hindrance of the state clause." This clause

prohibits conspiring

> for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws ... whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States.

The crucial additional element present here that supports application of the second clause is Operation Rescue's organized attempt to overwhelm the police and temporarily to institute mob rule in order to prevent plaintiffs from exercising their constitutional rights.

The logic behind the hindrance clause is that the constitutional requirement that the state secure to all persons equal protection of the laws must not be circumvented by a private mob preventing the state from securing equal protection. It applies here because, for example, if Falls Church, Virginia were voluntarily to withhold police protection from women seeking to visit the Commonwealth Women's Center out of a desire to prevent women from having abortions, the city would have violated the women's constitutional rights to abortion; where a mob seeks to achieve the same results — denying women their constitutional rights — by hindering and obstructing the city

from protecting people exercising those rights, the mob action violates the hindrance clause of § 1985(3).

A similar threat to state law enforcement would be posed by conspiratorial blockades that purposefully prevented African American and white children from attending integrated schools, kept members of a religious congregation from entering their temple, mosque, or church, or barred voters from the polls in a Hispanic neighborhood. Such blockades violate § 1985(3) because they constitute a conspiracy to nullify the constitutional rights of a disfavored class by overwhelming the state's ability to protect that class's rights. The role of state law in securing personal liberty and civil rights for all cannot be fulfilled when nationwide conspiracies are permitted purposefully to deny state-law protection to certain groups. Section 1985(3) thus complements state and local governments' efforts to provide legal protection when their ability to do so is most challenged.

In this case, the Falls Church police did all they could to secure the protection of state law to women in this action as plaintiffs sought to enter Commonwealth Women's Clinic to receive or render services there. Local and state efforts

proved inadequate, however, against the masses of people participating in the Operation Rescue blockade. The police force, even as supplemented at the city's expense by county and state law enforcement officers, was unable to secure access to the clinic for as long as six hours. During that time many patients were unable to receive medical treatment, including scheduled abortions.

It has only been since the federal court in this case entered an injunction under § 1985(3) against the blockades that the protections of state law have again been equally secured for women seeking constitutionally protected services from Commonwealth Women's Clinic. Operation Rescue now regularly conducts lawful, First Amendment-protected demonstrations outside the Commonwealth Women's Clinic. With the support of the federal court injunction, those women who choose to seek services at the picketed clinics are now able to do so.

In order to affirm, this Court need only determine that there is a substantial federal question supporting federal jurisdiction. The district court entered its injunction based on both state and federal law. As long as the district court properly exercised its federal jurisdiction, its decision must

stand on the unchallenged state law grounds. Because there is at the very least a substantial federal question under one of the two prongs of § 1985(3) at issue here, the decision of the district court must be affirmed.

I. OPERATION RESCUE VIOLATED 42 U.S.C. § 1985(3) BY CONSPIRING "FOR THE PURPOSE OF PREVENTING OR HINDERING" LOCAL AND STATE AUTHORITIES FROM "GIVING OR SECURING" TO THE PLAINTIFFS "THE EQUAL PROTECTION OF THE LAWS"

The Operation Rescue activities challenged in this case are plainly prohibited by 42 U.S.C. § 1985(3). Defendants' organized, conspiratorial efforts are designed expressly to hinder and prevent the local and state police from securing protection of the laws to plaintiffs that is equal to that enjoyed by persons who are not seeking to exercise their constitutional right to abortion. Section 1985(3) explicitly forbids such a conspiracy to nullify federal rights by frustrating state law enforcement. Operation Rescue's blockade was so effective that it completely prevented state and local police from protecting the plaintiffs. Like the inability of former Confederate states in the wake of the Civil War to protect African Americans and their Republican

supporters in the face of Ku Klux Klan mobs, the inability of municipal and state police to protect plaintiffs, despite their best efforts, worked a deprivation of plaintiffs' constitutional rights that is properly remedied under § 1985(3).

A. Defendants conspired to prevent police from equally enforcing state laws so as to protect women attempting to enter plaintiff clinics

The hindrance clause of 1985(3) "deal[s] explicit[ly]" with "interference with state officials," or "interference with or influence upon state authorities." *Griffin*, 403 U.S. at 98-99. The clause addresses the particular threat that private mob action poses to the rights of individuals when the mob prevents state governmental mechanisms from enforcing such rights. The clause is not directed at states' active impairment of rights, which 42 U.S.C. § 1983 addresses. Rather, Congress enacted it to provide a remedy where mob coercion renders state law ineffective. Newly elected Republican Southern state governments during Reconstruction faced precisely this problem from Ku Klux Klan-organized mobs: "The States themselves were

helpless" to enforce their laws. *United States v. Price*, 383 U.S. 787, 804 (1966). The section's second clause was written to respond to this problem. Thus, private conspirators' liability under that clause for hindering state and local officials from enforcing state law does not depend on complicity of state governments, but rather depends on whether the private conspiracy effectively has obstructed the operation of state law.

This Court over a century ago acknowledged that the language of the hindrance clause covers private conspiracies that seek to block state law enforcement. Just sixteen years after the passage of § 1985(3), the Court in *United States v. Harris*, 106 U.S. 629 (1883), reviewed criminal convictions based in part on a criminal statute that paralleled verbatim the hindrance clause of § 1985(3). The Court found that the clause covered a conspiracy by twenty armed defendants to break into the county jail and attack four prisoners in violation of Tennessee law. The defendants were charged with "preventing and hindering the constituted authorities of the State of Tennessee," specifically the sheriff, from safely keeping the prisoners in custody pending their trials, *i.e.*, from securing to them "equal protection of the laws of the

State of Tennessee." 106 U.S. at 631.[1] The Court found that the allegations in the indictment were within the terms of the criminal statute corresponding to the hindrance clause of § 1985(3), but it struck the statute as unconstitutional on grounds not relevant today. *Id.* at 644.[2]

The district court in this case found that Operation Rescue sought to stop abortions by obstructing and interfering with local and state law enforcement to the point where plaintiffs enjoyed no protection of state law. As the court explained, "[a]t a 'rescue,' the demonstrators, called 'rescuers,' intentionally trespass on the clinic's premises for the purpose of blockading the clinic's entrances and exits,

[1] This Court has since confirmed that the statutory phrase "equal protection of the laws" includes the protections of state law. *See Briscoe v. LaHue*, 460 U.S. 325, 337-38 (1983); *Griffin*, 403 U.S. at 103.

[2] The Court held that Congress did not have power to penalize all conspiracies to which the statute's language might conceivably be applied, such as conspiracies in which no government authorities, however hobbled, are involved. The constitutional determination would, of course, be resolved differently today. Under current law, federal courts are obligated to construe statutes so as to avoid any constitutional issues. *See, e.g., Griffin*, 403 U.S. at 104 ("we need not find the language of § 1985(3) now before us constitutional in all its possible applications in order to uphold its facial constitutionality and its application to the complaint in this case"). There is no question, in light of current understandings of Congressional power, that Congress has the authority to reach the conduct of defendants in this case, whether under the Fourteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), or under the commerce clause, *Katzenbach v. McClung*, 379 U.S. 294 (1964).

thereby effectively closing the clinic." *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1487 (E.D.Va. 1989). During a "rescue," plaintiffs do not enjoy the protection of state law. They cannot use their property free from trespass, enter contracts for medical service free from intentional interference and obstruction, or walk and drive on public roads unmolested.

The district court's findings that Operation Rescue intentionally hindered the state from providing equal legal protection are amply supported by the record. As Operation Rescue's own pamphlet explains: "1000 or 1500 peacefully praying around an abortion mill will be *very difficult* to arrest! In many cases like this in other movements, the officials did not arrest people because of the sheer numbers involved." R. 484 (emphasis in original).[3] Operation Rescue vowed to close down the plaintiff clinics. R. 73, 78. The clinics were "barraged by people" from Operation Rescue at least once a week. R. 70-71. "Rescue" participants blocked access to the clinics and assaulted staff, patients, and police trying to get through. R. 72. The

[3] Citations in the form "R. ___" refer to the record pages in the Court of Appeals Appendix.

police were required to respond on numerous occasions, but even "a concerted effort by the police department to arrest these people" would take "[h]ours," during which the clinic would remain closed. R. 97. Joint efforts by local and state law enforcement agencies were overwhelmed.

The "rescue" at Falls Church on October 29, 1988 followed Operation Rescue's pattern:

> Typical of most 'rescue' demonstrations, the rescuers outnumbered the Falls Church police officers on the scene that day. Even though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for more than six (6) hours. Limited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a clinic for some period of time.

Id. at 1489 n.4. Police Lieutenant Gregory King testified that an Operation Rescue leader "told me that the rescue mission would cease if I could guarantee that there would be no abortions at the clinic that day. And of course I couldn't guarantee those kinds of things." R. 212. He described in detail the hindrance that local and state police departments experienced at the hands of Operation Rescue:

> We have 30 sworn members. So, what that entails is getting together with four other agencies, I use the Arlington County Sheriff's Department, the Arlington County Police Department, the Virginia State Police and sometimes Virginia Department of Corrections to coordinate arrest procedures on the scene.
>
> Any time we have over 100 people to arrest, it would require just about all those agencies being joined together to make it work....
>
> [W]e knew that our clinic was going to be hit and we were able to plan and we were there long before it even got started. But [the clinic] still went down, yes.

R. 213-14. Notwithstanding some successful arrests and prosecutions, the blockades continued to occur. R. 107.

Operation Rescue's literature specifically urges local officials not to provide legal protection to plaintiffs:

> Our local civil authorities need not bow to Justice Harry Blackmun -- or for that matter, to our own abortion enthusiast, Barbara Mikulski. Our local authorities have responsibility for this municipality.... In defiance of Supreme Court edicts, our community can refuse to tolerate legalized childslaughter. That is only a starting point.

Pltfs. Exh. 11 (R. 472).[4] Operation Rescue seeks to

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[4] Operation Rescue members make no secret of the fact that they place themselves above the law. One witness recalled remarks of Operation Rescue leader Patrick Mahoney at an Operation Rescue conference:

> [Mahoney] mentioned the fact that there were injunctions out in the area and the emergency legislation that had passed in the D.C. area. And he said basically that these measures would not interfere with what they had come to do this weekend, which was to rescue on Friday and Saturday.

undermine federal protection for abortion rights by ensuring that state laws are not equally enforced on behalf of women seeking to use clinics where abortions are available.[5]

Violation of state law is not merely incidental to the

R. 232.

Operation Rescue's direct assault on judicial enforcement of rights in this case is typical of its conduct elsewhere. In New York, Operation Rescue founder Randall Terry "acknowledged his intention to disobey the district court's contempt order, and asked, '[w]ill we let this N.Y.C. court intimidate us back into silent cooperation with the killing .... [o]r will we face down this judge's order ...?'" *New York State NOW v. Terry*, 886 F.2d 1339, 1345 (2d Cir. 1989).

[5]Some Maryland law enforcement officials complied with Operation Rescue's suggestion that they simply refrain from protecting the state-law rights of women seeking abortions and of the clinics that provide them. Police Sergeant Walker in Forestville, Maryland requested that clinic staff close the Hillview Medical Center in anticipation of an Operation Rescue onslaught. R. 262. The clinic administrators said they could not do that, and attempted to open the clinic. When Operation Rescue blockaded it, police Captain Downs stated "We're outnumbered. There's nothing we can do." R. 273. He explained "I cannot pull all the resources from the county.... There's no help. We have 80 men, and I've already pulled the resources from the county ... and the state police. And we're doing all we can do." R. 276. A police liaison later concurred with Downs' assessment that the officials were overwhelmed: "You have to close because there's nothing we can do and it's not going to disband." R. 278. Patients who had not eaten for several hours in anticipation of surgery, some of whom were bleeding and in need of immediate medical care, were blockaded in cars and inside the barricaded clinic while Operation Rescue prevented the surgical staff from entering. R. 271. A clinic administrator testified that the police "told me we were on our own" in getting patients safely out of the clinic past the Operation Rescue people. R. 278.

Similarly, in Dobbs Ferry, New York, Operation Rescue "entered into an express agreement with police officers that no demonstrators would be arrested so long as they agreed to leave the site by noon of that day." *New York State NOW v. Terry*, 704 F. Supp. 1247, 1260 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990).

activities of Operation Rescue; the very purpose of its campaign is to overwhelm the capacity of the police to keep the facilities open. It is by frustrating police efforts to keep open the clinics and to protect plaintiffs' lawful use of clinic facilities that Operation Rescue succeeds in stopping some planned abortions. As Operation Rescue founder Randall Terry explained, "over 15 years of education and political lobbying have gotten us virtually nowhere." Pltfs. Exh. 1 (R. 444).[6] Thus, instead of relying on speech and political persuasion, Terry organizes coercive blockades.

The hindrance clause of § 1985(3) is not limited to prohibiting conduct under color of law. This Court in *Griffin* unanimously rejected the requirement that the private deprivation there complained of be inflicted under color of state law, because "[t]o read any such a requirement into § 1985(3) would ... deprive that section of all independent

---

[6]The enjoined operations are distinct from First Amendment-protected activities by which participants attempt to change the conduct of others through symbolic or verbal persuasion. *Cf. Texas v. Johnson*, 109 S.Ct. 2533 (1989). The distinct aim of a "rescue" operation is not simply to exercise rights of association and expression, but to outnumber the police and to flood the area surrounding a clinic so completely that women are prevented from entering *not* because they have been *convinced* to doubt their choice to go in, but because they *physically cannot*. When a rescue succeeds, it is because local law has been rendered ineffective to protect the women seeking to enter the clinics.

effect." 403 U.S. at 99; *see also id.*, at 97 (holding that "there is nothing inherent in the phrase ['equal protection of the laws'] that requires the action working the deprivation to come from the State"). As the Court noted in *Monell v. New York City Department of Social Services*, "[§ 1985(3)] as passed, unlike [§ 1983], prosecuted persons who violated federal rights *whether or not that violation was under color of official authority*, apparently on the theory that Ku Klux Klan violence was infringing the right of protection as defined by [*Corfield v.*] *Coryell*. [4 Wash CC 371 (CC ED Pa 1825)]" 436 U.S. 658, 670 n.21 (1978) (emphasis added).[7]

Griffin's reasoning that the deprivation clause of § 1985(3) must be read so as not to duplicate the coverage of § 1983 is equally true of the hindrance clause. Each of these contemporaneous statutory provisions prohibits a distinct kind of conduct. Section 1983 applies against deprivation of rights under color of state law. The first clause of § 1985(3) provides a remedy against private

[7]The 1871 Congress read *Coryell* as defining a Fourteenth Amendment right to "protection by the government," not limited to protection from unequal treatment but including affirmative rights to state protection of person and property.

conspiracies to deprive persons of their legal rights, and the second clause remedies deprivations of rights at the hands of private conspiracies that disable the state from protecting plaintiffs' rights. *Kush v. Rutledge*, 460 U.S. 719, 724-25 (1983). Where the deprivation is committed under color of law, § 1983 provides a remedy against public and private persons alike. *Adickes v. Kress & Co.*, 398 U.S. 144, 152 (1970). The distinct role of the hindrance clause of § 1985(3) is to remedy deprivations carried out not under color of law, but by displacing the law with the force of mob rule.

B. Defendants' conspiracy blocked plaintiffs from exercising their federal constitutional right to abortion

Operation Rescue infringed plaintiffs' constitutional abortion rights in precisely the manner prohibited by § 1985(3). The statute forbids conspiratorial action whereby a person is "deprived of having and exercising any right or privilege of a citizen of the United States." It thus applies

to all rights enjoyed by a United States citizen.[8] Although it remains unsettled whether the statute also remedies violations of federal statutory rights or of rights created by the states, *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 833-34 (1983), it is clear that federal constitutional rights are protected.[9] Thus, even in the view of those who would confine § 1985(3) coverage to "conspiracies to violate those fundamental rights derived from the Constitution," *Great American Savings & Loan Association v. Novotny*, 442 U.S. 366, 379 (1979) (Powell, J., concurring), defendants' conspiracy to violate plaintiffs' right to abortion is covered.[10]

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[8] *Cf. United States v. Price*, 383 U.S. 787, 800 (1966) (holding that the reference in 18 U.S.C. § 241 to rights secured by "the Constitution or laws of the United States" means that the statute embraces rights secured by "*all* of the Constitution and *all* of the laws of the United States").

[9] The legislative history shows that the statute was aimed at remedying more than simply violations of federal constitutional rights. Cong. Globe, 42d Cong., 1st Sess. 375 (Rep. Lowe); *id.* at 428 (Rep. Beatty); *id.* at 506 (Sen. Pratt); *id.* at 514 (Rep. Poland).

[10] Another right at issue here, of course, is plaintiffs' constitutional travel right. *Amicus* agrees with the position advanced in Respondents' brief that defendants' conspiracy violated plaintiffs' right to travel. That right is assertible against purely private conspiracies, and defendants would be liable for violating it even had they not affected the government.

Because defendants did act upon the state, however, they are also liable for obstructing plaintiffs' access to abortion. Application of the hindrance clause to abortion is exclusively discussed here because of the distinct issues it raises.

As the district court found, Operation Rescue intentionally prevented women from obtaining abortions. Operation Rescue members "trespass on to clinic property and physically block ingress into and egress from the clinic, [so] existing and prospective patients, as well as physicians and medical staff are unable to enter the clinic to render or receive medical or counselling services." 726 F. Supp. at 1489. They do so in order "(i) to prevent abortions, [and] (ii) to dissuade women from seeking a clinic's abortion services ...." *Id.* at 1488. The record shows that Operation Rescue participants in fact did prevent women from entering the clinic by blocking the doors to the clinics with their bodies and with trash dumpsters. R. 75.

The fact that the right to abortion has been the subject of much controversy only underscores the need for protection of its exercise under § 1985(3). When the statute was passed, the Thirteenth, Fourteenth, and Fifteenth Amendments were at least as controversial, as was the notion of extending other constitutional rights to African Americans. The Ku Klux Klan sought to prevent

Republicans and African Americans from exercising their new constitutional rights by committing torts and crimes such as assault, battery and lynching. Congressional Globe, 42nd Cong., 1st Sess. 157 (Sen. Sherman); *id.* at 320-21 (Rep. Stoughton); *id.* at 412-13 (Rep. Roberts); *id.* at 444 (Rep. Butler). It was precisely because the rights created by the Reconstruction Amendments were not universally accepted that Congress enacted the Civil Rights Act of 1871 to enhance the remedies accorded for violations of such rights. Women's reproductive freedom is similarly under broad attack by Operation Rescue, a nationwide conspiracy to undermine the exercise of abortion rights. Defendants in this case, like the conspirators at whom § 1985(3) originally was aimed, seek forcibly to revoke constitutional rights that they have been unable to repeal through legal and political processes.

The efforts of law enforcement authorities to prevent defendants' interference with plaintiffs' rights do not obviate the fact that Operation Rescue blockades "involve or affect" the state as required under the hindrance clause as interpreted in *Carpenters*, 463 U.S. at 831. In rejecting a claim that a conspiratorial deprivation of First Amendment

rights by purely private actors is redressable under § 1985(3), the Court in *Carpenters* contrasted the conduct of the private defendants in that case with circumstances in which "the aim of the conspiracy is to influence the activity of the State." *Id.* at 830. In the latter situation, the state is sufficiently affected to sustain application of the hindrance clause of § 1985(3) to remedy violations of constitutional rights otherwise assertible only against the state. In his dissenting opinion in *Carpenters*, Justice Blackmun, joined by Justices Brennan, Marshall and O'Connor, agreed with the majority's legal interpretation of the hindrance clause, explaining that:

> The Court does not require that the conspirators be state officials or act under color of state law. Instead, the requirement is that the conspiracy intend to cause the State or a person acting under color of state law to deprive the victims of the conspiracy of their constitutional rights.

Id. at 840 n.2. What is needed under the hindrance clause is "state involvement in the form of an intent [by private defendants] to interfere with state officials." *Id.* at 848-49 and n.13. Thus, the intent of the private defendants is sufficient, and need not be accompanied by invidious intent on the part of the government.

The right to abortion that Operation Rescue obstructs is an independent right that supports a claim under § 1985(3). "Section 1985(c) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Novotny*, 442 U.S. at 372. It "is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right ... is breached by a conspiracy in the manner defined by the section." *Id.* at 376. Because the rights infringed in *Carpenters* were First Amendment rights, and the First Amendment restrains only official conduct, the failure to show any effect on the state was fatal to plaintiffs' claim. 463 U.S. at 833.

Operation Rescue, in contrast, did affect government actors. It sent people to glut the area surrounding reproductive health clinics with demonstrators so as to outnumber the police and prevent them from keeping the clinics open. This is just the kind of private action that Justice Stevens, concurring in *Novotny*, explained does involve the state:

> if private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(c).

442 U.S. at 384 (footnote omitted). The Court in *Griffin* similarly took for granted that either hindrance of law or massive private lawlessness would support § 1985(3) liability. 403 U.S. at 98-99. Where a private conspiracy acts on the state as described in *Griffin*, *Novotny*, and *Carpenters*, there is sufficient infringement of state protection of persons exercising constitutional rights to support a section 1985(3) remedy, even where the conspiracy impairs constitutional rights protected only against deprivation by the government.[11] This result is required by the statute's recognition, in the hindrance clause, of the practical equivalence between a state withholding its protection from people exercising certain rights and a private conspiracy coercing the state into not giving protection.

The legislative history clearly supports the view that active governmental complicity is not required.

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[11] *See, also, Collins v. Hardyman*, 341 U.S. 651, 661 (1951) (finding no liability against private defendants because "[t]here is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it").

Representative Poland argued:

> if a state shall deny the equal protection of the laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the state authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States.

Cong. Globe, 42d Cong., 1st Sess. 514 (Rep. Poland). Analogously, Senator Morton stated, "If a state fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether the failure is willful or the result of inability can make no difference." *Id.* at App. 251 (Sen. Morton). Many other members of Congress expressed similar views.[12] The Court should give effect in this case to Congress's clearly expressed intent to provide a remedy when an organized mob overwhelms law enforcment authorities and prevents them from protecting individual rights.

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[12] See id. at 428 (Rep. Beatty) (stating that the State can deny equal protection through either lack of power or inclination); id. at 459 (Rep. Coburn) (stating that a private conspiracy to fetter arrest denies equal protection); id. at 481-82 (Rep. Wilson) (stating that Congress has power to enact protective legislation when a State is unable to execute its laws equally); id. at App. 315 (Rep. Burchard) (stating that hindrance of state's ability to secure equality of protection violates the statute).

II. CLASS ANIMUS IS NOT A REQUIRED ELEMENT OF A HINDRANCE CLAIM

Defendants' intent to deprive women of their constitutional right to abortion constitutes invidiously discriminatory class animus. Point III., *infra*. However, under § 1985(3)'s hindrance clause, class animus is not a necessary element of plaintiffs' claim. Where a conspiracy acts *against the state* to impair *any* group's equal enjoyment of the state's affirmative legal protection, Congress provided a remedy in the hindrance clause of § 1985(3).

The class animus requirement is not explicit in the text of § 1985(3). Unlike 42 U.S.C. §§ 1981 and 1982, which grant all citizens the exercise of certain rights as are "enjoyed by white citizens," § 1985(3) does not by its terms prohibit only racial discrimination. The deprivation clause of § 1985(3) applies to "*any* persons or class of persons," and the hindrance clause protects "*all* persons."

The limitation of § 1985(3) coverage to purely private conspiracies acting with "some racial, or perhaps otherwise class-based invidiously discriminatory animus" is a judicial construction of the word "equal" in the first clause of § 1985(3). *Griffin*, 403 U.S. at 102. In determining that

the language of the first clause of § 1985(3) did not preclude its application to purely private conspiracies, the Court in *Griffin* expressed concern about "[t]he constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law." *Id.* The Court avoided such a sweeping interpretation of that clause by identifying in the legislative history some indications that, as to purely private conspiracies, a requirement of class animus inhered in the statute's guarantee of "*equal* protection, or *equal* privileges and immunities." *Id.*[13]

Griffin's construction of the term "equal" in the deprivation clause as prohibiting only invidious class animus does not apply to the hindrance clause. This difference

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[13]*Griffin* relied on legislative history in construing "equal protection" because the phrase is not defined in the text of § 1985(3). But that phrase is defined in another provision of the 1871 Act in a manner supporting the conclusion that no invidious animus need be shown for hindrance claims. Section 3 of the unconsolidated version of the 1871 Act "deemed" it to be "a denial ... of the equal protection of the laws" for a State to be unable to protect "any *portion* or class of the people" from a conspiracy to deprive them of their constitutional "rights, privileges, or immunities, or protection." Section 3 was aimed, among other things, at "insurrection, domestic violence, unlawful combinations or conspiracies" that "obstruct or hinder the execution of the laws," and authorized the President to use federal military force to suppress the insurrection. Thus, § 3 addressed circumstances more extreme than but parallel to those described in the hindering clause of § 2 of the 1871 Act, (§ 1985(3)). The statutory reference to a "portion" of the people suggests that *all* types of people — whether or not otherwise specially protected by the constitution or statutes — may seek remedies under the hindrance clause.

derives from the distinction between the constitutional concepts on which each clause is based. An obligation to *give* or *secure* "equal protection of the laws" is, in its most literal sense, an affirmative requirement that the state equally enact and apply its laws to all persons unless it has a legitimate reason for distinguishing among persons. It does not depend on invidious animus, whether based on race, gender, or some other "suspect" characteristic. This is the constitutional concept referred to in the hindrance clause of § 1985(3), and it applies only where the state is somehow involved. In contrast, the constitutional concept of refraining from *depriving* persons of "equal protection of the laws" is also applicable to purely private conduct, through legislation, as a negative prohibition on certain invidiously motivated action. This is the concept referred to in the private deprivation clause of § 1985(3). Thus, while private conspirators' deprivation of rights are guaged by their animus, *see Griffin*, 403 U.S. at 102, conspiracies causing

the government to fail to secure legal protection should not be.[14]

The legislative history of § 1985(3) shows Congress's intent, where equality of legal *protection by government* was at stake, to include *all* groups within the statute's coverage. Representative Buckley explained:

> The proposed legislation is not intended to be partisan in its beneficent operations. It is not to protect Republicans only in their property, liberty, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women and children, all races and all classes, will be benefitted alike, because we are simply contending for good government and righteous laws.

Id. at 190. Representative Lowe stated, early in the debates, "[e]very consideration of justice and good faith requires that *protection* be given to all classes in all States; to persons of every complexion and of whatever politics." *Id.* at 376 (emphasis added). Representative (later President) Garfield spoke in favor of equal laws and equal administration of them in terms that reflect the right of *all* persons to equal

[14]The Court's comment in *Griffin* that it "need not decide ... whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable *under the portion of § 1985(3) before us*," 403 U.S. at 102 n.9 (emphasis added), suggests that the animus analysis differs under other portions of the statute, such as the hindrance clause at issue here.

governmental protection:

> It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions, like the air of heaven, covering all and resting upon all with equal weight. The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to *any* class of citizens, either by the courts or the executive officers of the State.

Cong. Globe, 42d Cong., 1st Sess. App. 153 (emphasis added). Representative Barry, using the verb "to secure" which appears in the hindrance clause and not the deprivation clause, said that the Act sought broadly to "secur[e] to *all* men, white or black, native or adopted citizens, an entire, an inviolable, an unquestionable equality before the law." *Id.* at 267 (Rep. Barry). Thus, where legal protection by the government is impaired, *i.e.* where a claim arises under the hindrance clause, invidious class animus is not required.

This interpretaion is consistent with the reasoning of *Griffin*. The risk of creating "a general federal tort law" prompted the Court in *Griffin* to emphasize that purely private conspiracies are only covered when they act out of invidious animus, 403 U.S. at 102. Prohibition of conspiracies that hinder the state, without regard to their

invidious animus, does not create this risk.

It was *Griffin's* recognition that the deprivation clause reached private conspiracies that revealed such a threat. The hindrance clause, in contrast to the deprivation clause, applies only to conspiracies that prevent or hinder the state from securing legal protection to persons within its boundaries. The primacy of state law enforcement is thus explicitly recognized by the clause, and the § 1985(3) remedy is available only to supplement obstructed state efforts. Far from usurping state tort law, the hindrance clause thus acts as a federal safeguard against conspiratorial efforts to render state law ineffective.

The presence of the word "equal," from which the Court in *Griffin* derived the class animus requirement, in the hindrance clause's reference to "equal protection of the laws" does not mean that class animus is also required under that clause. It is true that the Court in *Kush v. Rutledge*, 460 U.S. 719, 726 (1983), viewed the absence of the word "equal" in the first part of § 1985(2) as "of greatest importance" in supporting its holding that no class animus is required under that portion of the 1871 Act; there surely can be no judicial construction applicable to a term that does not

appear. The question remains, however, whether the same construction is appropriate every time such term does appear.[15] In *Kush*, as in *Griffin*, the Court's analysis focused on the risk of "extend[ing] federal authority and displac[ing] state control over private conduct." 460 U.S. at 726. Because the hindrance clause is aimed at *enhancing* the effectiveness of state law, *Kush*, like *Griffin*, suggests that the class animus limitation does not apply to hindrance claims.

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[15]It is more noteworthy that the word "equal" precedes "privileges and immunities" in the deprivation clause than that it appears in the phrase "equal protection" in both the deprivation and hindrance clauses. These statutory terms derive from the Fourteenth Amendment, albeit loosely, *see Griffin*, 403 U.S. at 97, but there is an "extra equal" in the deprivation clause only, and not in the hindering clause.

III. OPERATION RESCUE'S INVIDIOUS ANIMUS AGAINST WOMEN SATISFIES ANY CLASS ANIMUS REQUIREMENT THAT MIGHT APPLY

If the Court determines that class animus must be shown even under the hindrance clause, the decision below should be affirmed because Operation Rescue acted with animus against women seeking abortions. This Court has yet to define the precise scope of the class animus requirement under § 1985(3). The Court held in *Griffin*, 403 U.S. at 102, that a conspiracy motivated by racial animus violated the statute, but held in *Carpenters*, 463 U.S. at 835, that a conspiracy motivated by economic animus against non-unionized workers did not. *Griffin* left open what kinds of non-racial animus might be actionable, 403 U.S. at 102, and *Carpenters* similarly dealt with the particular conspiracy before the Court without laying out general principles for evaluating defendants' motivation under § 1985(3). *Carpenters* explicitly declined to decide whether the statute forbids the conspiracies described by Senator Edmunds in the congressional debates, such as those directed at classes because of their political views or religion. 463 U.S. at

837.[16] Instead, the Court found no evidence that the Klan "had a general animus against either labor or capital, or .... against enterprising persons trying to better themselves," *id.* at 838, and out of reluctance to "extend § 1985(3) into the economic life of the country in a way that we doubt the 1871 Congress would have intended," *id.* at 837, refused to read the statute to prohibit defendants' pro-union animus. *Id.*

The district court in this case found invidious class animus on the ground that "[p]laintiffs' members and patients constitute a subset of a gender-based class," with discrete, insular and immutable characteristics. *National Organization for Women v. Operation Rescue*, 726 F. Supp. at 1492. The court also described Operation Rescue's conduct as "a conspiracy to deprive women seeking

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[16]Senator Edmunds explained, in now-familiar terms, his understanding of

> that equality of protection ... which the Constitution of the United States gives.... [I]f, in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter ... then this section would reach it.

Cong. Globe, 42d Cong. 1st Sess. 567. In his view, only in instances of purely personal malice, such as "a neighborhood feud of one man or set of men against another," would the statute not apply. *Id.*

abortions of their rights guaranteed by law ...." *Id.* at 1493. The Fourth Circuit properly upheld the finding of gender-based animus, recognizing that "animus against classes defined by 'race, national origin and sex' meet [the] requirement of class-based animus within [the] meaning of 1985(3)," 914 F.2d at 585, (*following Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985)). Findings of class animus, like findings of intent, are "peculiarly factual issues for the trier of fact." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), (quoting *U.S. v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949)). The district court's findings, affirmed by the court of appeals, are not "clearly erroneous" and must therefore be accepted by this Court. Fed. R. Civ. P. 52(a).

The class animus motivating Operation Rescue's conspiracy meets even the most restrictive class-animus test that could fairly be derived from the statute, this Court's prior § 1985(3) cases, and the legislative history. At a minimum, § 1985(3) prohibits conspiracies motivated by animus toward groups, including women, that are specially protected under the Fourteenth Amendment. Neither Petitioners nor the United States contends that conspiracies motivated by animus against women are not covered. The

1871 Act was written in part to enforce the Fourteenth Amendment, which affords special protection to women.[17]

The distinction that petitioners, and *amici* in their support, attempt to draw between animus against women and animus against abortion is both factually and legally untenable. As a factual matter, only women have abortions. Women's procreative capacity is a fundamental aspect of their gender identity. In recognition of this close nexus between pregnancy-related conditions and gender, Congress in the context of Title VII of the Civil Rights Act of 1964 has as a matter of law defined discrimination based on preganancy-related conditions as sex discrimination. Under Title VII, discrimination because of "pregnancy, childbirth, or related medical conditions" is discrimination "because of sex." 42 U.S.C. §2000e(k).[18]

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[17]The Court's failure in *Griffin*, 403 U.S. at 102, to assume that gender bias, too, would necessarily be prohibited under a statute enforcing the Fourteenth Amendment may be explained by the fact that at that time the Court had not yet recognized women as a class entitled to special constitutional protection. *See, Frontiero v. Richardson*, 411 U.S. 677 (1973).

[18]In amending Title VII to prohibit discrimination based on pregnancy-related conditions, Congress expressly rejected the contention defendants here advance that abortion is an "activity" somehow separable from the gender of women who seek it. In overturning *General Electric Company v. Gilbert*, 429 U.S. 125 (1976), Congress codified the "commonsense [notion] that since only women can become pregnant, discrimination against pregnant people is

Because it is a question of statutory construction whether anti-abortion animus is sex-based animus under the Civil Rights Act of 1871, the Congressional definition of sex discrimination in the context of Title VII should be applied. Abortion is a pregnancy-related condition. It is inconceivable that Congress would prohibit an adverse employment action on the basis of abortion, yet permit it as the basis for conspiratorial mob action.[19]

Griffin looked to the legislative history of § 1985(3) when it identified the requirement class animus, 403 U.S. at 102. That history is an additional source of guidance in identifying the requirement's scope. The Congressional debates identified in *Griffin* as the source of the class animus

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necessarily discrimination against women...." *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 679 n.17 (1983) (quoting 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins)).

[19]The Solicitor General's reliance on *Geduldig v. Aiello*, 417 U.S. 484 (1974), is inappropriate for three reasons. First, the Fourteenth Amendment does not place a ceiling on what Congress can do to redress inequality, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), so the meaning of class animus is a matter of statutory, not constitutional, interpretation. Second, the Court in *Geduldig* granted deference to the state's interest in maintaining an economically viable insurance program, and no similar deference is owed to a private conspiracy seeking to impede the exercise of fundamental rights. Third, that case involved withholding benefits, not affirmatively interfering with the exercise of a right. The "distinction between benefits and burdens is more than one of semantics," *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977). If a government employer had discharged Aiello for becoming pregnant, it would have violated equal protection.

requirement, *see* 403 U.S. at 102, were those discussing Representative Shellabarger's amended version of § 1985(3). These debates reflect Congress' understanding that the classes protected by the statute encompass more than racial classes. Definitions of class animus tied to any number of invidious distinctions, such as a group's historical experience of discrimination, its political vulnerability, or even the constitutional importance of the rights it seeks to exercise are all consistent with the legislative history of the statute.

Representative Shellabarger introduced the Bill as amended to reflect Congress's intention that the deprivation clause remedy not all conspiratorial deprivations of rights, but only those with invidious animus:

> The object of the amendment is, as interpreted by its friends who brought it before the House, so far as I understand it, to confine the authority of this law to the prevention of deprivations which shall attack the *equality* of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.

Cong. Globe, 42d Cong., 1st Sess. 478 (Rep. Shellabarger) (emphasis added). No representative ever sought to enumerate, much less circumscribe, the classes that would

have standing under § 1985(3) for invidiously motivated deprivations of their rights. Representative Dunnell listed some of the types of invidious animus with which Congress was then concerned:

> This law is asked for the protection of every class of citizens. We demand it not simply for the black man, but for the Union men of the South, and even for the ex-rebels who would now yield obedience to the Government.

Id. at App. 262. Senator Boreman discussed the groups which the Fourteenth Amendment empowered the Congress to protect by enacting remedies for conspiratorial violations of their rights:

> It is not restricted to guarantying [*sic*] the right of a "citizen" of a northern State to go into the South, the citizen of a southern State to go into the North, and be shielded and protected as such, but it extends to every "person," whether he has come from another State or not, to every person residing anywhere, everywhere, within the United States. So that while, before this amendment, if there was any question whether there were any class of persons in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject.

Id. at App. 229. The few Congressmen who objected to the apparent breadth of the protected classes did *not* attempt to amend the Bill to protect against racial discrimination only, or to cover only those groups the Ku Klux Klan was actually

attacking at the time, but simply advocated that the Bill not be passed.[20]

The understanding of Congress, both supporters and detractors, was that the 1871 Act would prohibit invidious animus against members of any vulnerable class or group, whether its vulnerability derived from immutable characteristics, a history of oppression, or a precarious grasp on newly bestowed rights, as was true for the freed slaves, or from a functional position as a political and cultural minority in the midst of a hostile majority, as was true of the Northern Republicans. The efforts of Operation Rescue to wrest women's abortion rights from them by mob action undermine legal protection when women need it most. Women as a class are afforded special protection under the federal Constitution and other civil rights statutes. The immutable characteristic that distingushes them as a class is their procreative capacity. A conspiracy that seeks to

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[20]Representative Harris, opposing the Bill, said "[t]here is one good feature in this bill; that is, it applies to all." *Id.* at 484.

For objections to the breadth of the Bill on other bases, *see, e.g., id.* at App. 139 (Rep. McCormick); *id.* at 572 (Sen. Stockton); *id.* at 576 (Sen. Trumbull).

deprive them of legal protection on that ground should not go unchecked under § 1985(3).

CONCLUSION

For the reasons stated in the foregoing brief of *Amicus Curiae* the NAACP Legal Defense and Educational Fund, Inc., the decision of the United States Court of Appeals for the Fourth Circuit Court should be affirmed. The LDF advocates reliance on law to protect equal enjoyment of civil and constitutional rights. The hindrance clause is a crucial safeguard for the enforcement of state and local law against private persons seeking to take law into their own hands through mob force. The injunction in this case has enhanced the equal enforcement of state law to all persons in Virginia without regard to their gender and their exercise of unpopular rights, and should not be disturbed.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, ET AL., PETITIONERS

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a conspiracy to deter pregnant women from obtaining abortions involves the kind of class-based animus required by 42 U.S.C. 1985(3).

2. Whether obstructing access to a medical facility deprives out-of-state patients of their constitutional right of interstate travel.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-985

JAYNE BRAY, ET AL., PETITIONERS

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

Various acts of Congress exclude abortion services from the ambit of federal medical assistance programs. See, *e.g.*, 20 U.S.C. 1688; 42 U.S.C. 300a-6 (Title X family planning programs); 42 U.S.C. 300z (Adolescent Family Life Act); Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (Hyde Amendment). A decision by this Court that opposition to abortion is a form of gender-based discrimination could bring those laws into question, on the ground that they violate equal protection principles underlying the Due Process Clause by discriminating against women. The United States also participated as amicus curiae in two earlier cases involving the scope of 42 U.S.C. 1985(3), *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979), and was a party in *United States* v. *Guest*, 383 U.S. 745 (1966),

which involved a closely related federal criminal statute, 18 U.S.C. 241.[1]

STATEMENT

1. Petitioner Operation Rescue is an unincorporated association with the principal goals of preventing abortions and ending the legalization of abortion. Operation Rescue seeks to achieve these goals by, among other means, conducting "rescue" demonstrations at abortion clinics. Petitioners also include six individuals who oppose abortion and its legalization, and who participate in demonstrations organized and planned by Operation Rescue. Respondents are nine abortion clinics located in the greater Washington, D.C., metropolitan area[2] and five organizations that seek to establish and preserve access to abortion. Pet. App. 16a, 18a-20a.

During "rescue" demonstrations, petitioners obstruct the entrances to and exits from an abortion clinic, thereby effectively closing the clinic temporarily, preventing abortions from being performed for that period, and "rescuing" the fetuses that would otherwise have been aborted. Pet. App. 18a. The purpose of these demonstrations, as described in Operation Rescue's literature, is to "intervene between abortionists and the innocent victims," by "*physically* blockading abortion mills with [human] bodies." *Id.* at 20a (quoting *Operation Rescue, National Day of Rescue—October 29, 1988* (1988)). During

[1] The United States, in addition, has participated in the defense of actions brought against federal officers and employees under 42 U.S.C. 1985(3). *E.g., Martinez* v. *Winner*, 771 F.2d 424 (10th Cir. 1985) (federal prosecutors); *Jafree* v. *Barber*, 689 F.2d 640 (7th Cir. 1982) (FBI agents); *Gillespie* v. *Civiletti*, 629 F.2d 637 (9th Cir. 1980) (U.S. marshals).

[2] The Washington metropolitan area encompasses the District of Columbia; Prince Georges and Montgomery Counties in Maryland; and Arlington County, Fairfax County, the City of Fairfax, the City of Falls Church, Loudon and Prince William Counties, and the City of Alexandria in Virginia. Pet. App. 17a n.2.

such a demonstration, no person—male or female—is allowed by the demonstrators to enter the clinic.[3]

2. Respondents brought this action in the United States District Court for the Eastern District of Virginia, seeking, among other things, to enjoin petitioners from impeding access to certain medical facilities. In their complaint, respondents asserted that petitioners had violated 42 U.S.C. 1985(3) by conspiring to interfere with respondents' rights to travel interstate and to obtain abortions. Respondents included in their complaint pendent state law claims for trespass, public nuisance, and tortious interference with business relationships. Pet. App. 27a.

Following an expedited hearing, the district court entered a temporary restraining order, barring petitioners from conducting demonstrations at certain medical facilities. Pet. App. 6a. After a trial, the court issued a permanent injunction, barring petitioners from "trespassing on, blockading, impeding, or obstructing access to or egress from the [listed] premises." *Id.* at 11a. The court found that "[s]ubstantial numbers of women seeking the services of clinics in the Washington Metropolitan area travel interstate to reach the clinics," *id.* at 22a, and held that petitioners had violated 42 U.S.C. 1985(3) by conspiring "for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counselling services, of the right to travel," Pet. App. 29a-30a.[4]

[3] [W]hile the child-killing facility is blockaded, no one is permitted to enter past the rescuers, *neither women nor men*. Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress.

J.A. 25 (Affidavit of Randall Terry) (emphasis added). The above quotation also is included in the district court's opinion, except that the district court's opinion omits the phrase "neither men nor women." See Pet. App. 20a.

[4] The dates for the demonstrations that petitioners had planned for November 1989 had passed by the time that the district court

In reaching that conclusion, the district court acknowledged that, under this Court's decisions in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. 825 (1983) (*Carpenters* v. *Scott*), a plaintiff must prove the following four elements in order to establish a violation of Section 1985(3): (1) the defendant engaged in a conspiracy; (2) the defendant did so for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; (3) a co-conspirator took some act in furtherance of the conspiracy; and (4) a person was thereby injured in his person or property, or was deprived of a right or privilege enjoyed by a citizen of the United States. Pet. App. 27a-28a, citing *Griffin* v. *Breckenridge*, 403 U.S. at 102-103, and *Carpenters* v. *Scott*, 463 U.S. at 828-829. The court concluded that respondents had easily satisfied the first, third, and fourth elements of the *Griffin* test. Pet. App. 28a-31a. With regard to the second element, the court held that "gender-based animus satisfies the 'purpose' element of Section 1985(3)," and that "a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under Section 1985(3)" because respondents' "members and patients constitute a subset of a gender-based class." Pet. App. 28a-29a. The court did not decide whether petitioners also had violated Section 1985(3) by obstructing respondents' right to obtain an abortion, noting that respondents' claim in this regard was "problematic" because of the "likely absence of state action on these facts," Pet. App. 31a-32a. See also *id.* at 31a-33a. The court also held that respondents were entitled to relief under their state law trespass and public nuisance theo-

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issued the permanent injunction. Nonetheless, relying on the "capable of repetition, yet evading review" doctrine, the district court ruled that the case was not moot. Pet. App. 25a-26a.

ries, but not on their claim for tortious interference with business relationships. *Id.* at 33a-36a.[5]

3. Petitioners appealed, and the court of appeals affirmed in a per curiam opinion. Pet. App. 1a-9a.[6] The court stated that the district court's "holding that gender-based animus satisfie[d] the 'purpose' element of § 1985(3) has been forecast by" earlier Fourth Circuit case law. *Id.* at 8a. Moreover, agreeing with the Second Circuit, the court held that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." Pet. App. 8a, citing *New York State NOW* v. *Terry*, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990). The court did not decide whether Section 1985(3) encompasses violations of a right to privacy. Pet. App. 9a.[7]

SUMMARY OF ARGUMENT

I. In *Griffin* v. *Breckinridge*, 403 U.S. at 102, this Court concluded that Section 1985(3) requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." No such invidiously discriminatory purpose is present here. Petitioners do not aim their anti-abortion demonstrations exclusively at women; nor do petitioners harbor a gender-based animus. Petitioners target their actions at anyone

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[5] The permanent injunction was originally set to terminate on July 31, 1990, but the district court subsequently extended the order on two occasions. Pet. App. 57a. The order is now scheduled to expire on September 24, 1991. By its own terms, however, the injunction may be extended for good cause shown. *Id.* at 60a.

[6] Respondents appealed the district court's denial of broader injunctive relief. The court of appeals upheld the district court's judgment in this respect, Pet. App. 8a-9a, and respondents did not seek review in this Court of that aspect of the judgment below.

[7] The Fourth Circuit also upheld the district court's refusal to dismiss the state law claims and to award respondents attorneys fees and costs. Pet. App. 9a.

—male or female—who is involved in the abortion process. In fact, it is more accurate to say that petitioners' demonstrations are targeted at abortion itself than at persons of any particular gender.

Opposition to abortion is not a form of gender-based discrimination, even though only women can have abortions. Like the Equal Protection Clause, Section 1985(3) does not provide a remedy for conduct that only has a disproportionate effect on women; it requires proof of invidious discrimination. Treating women differently because they seek an abortion is not a form of invidious discrimination on the basis of gender. The Court has held that treating women differently due to pregnancy is not necessarily a form of gender discrimination. *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497 n.20 (1974). That principle applies with greater force in the case of abortion, since "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980).

II. The Court has held that the Constitution protects the right to travel interstate, and that Section 1985(3) provides a damages remedy for a violation of that right by private parties. The Court's cases, however, have not found that the right to travel interstate is violated in the absence of purposeful conduct discriminating against that right. In this case, the district court did not find that petitioners hold demonstrations for the principal purpose of preventing respondents from travelling interstate, nor did the courts below hold that petitioners' actions discriminate against out-of-state residents. Respondents therefore have not proved a violation of their right to travel interstate.

ARGUMENT

I. A CONSPIRACY TO DETER PREGNANT WOMEN FROM HAVING ABORTIONS DOES NOT INVOLVE THE KIND OF CLASS-BASED ANIMUS REQUIRED BY 42 U.S.C. 1985(3)

A. Introduction

Section 1985(3) of Title 42 does not provide a damages remedy for all conspiracies that injure a person in the exercise of legal rights.[8] By its terms, Section 1985(3)

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[8] As noted above, the district court relied on Section 1985(3) (along with ancillary state law claims) as a basis for enjoining future demonstrations by petitioners. In entering that injunction, however, the district court did not address the question whether Section 1985(3) authorizes a district court to award injunctive relief, as opposed to damages. In our view, it is doubtful that the district court had the power under Section 1985(3) to enter an injunction against petitioners.

By its terms, Section 1985(3) provides only that a plaintiff "may have an action *for the recovery of damages* * * * against any one or more of the conspirators" (emphasis added). In this regard, Section 1985(3) differs sharply from 42 U.S.C. 1983, which also derives from the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13. See *id.* § 1, 17 Stat. 13 (original version of Section 1983); *id.* § 2, 17 Stat. 13-14 (original version of Section 1985(3)). In contrast to Section 1985(3), Section 1983 authorizes "action[s] at law, *suit*[s] *in equity*, or other proper proceeding[s] *for redress*" (emphasis added). In light of the affirmative provision for damages in Section 1985(3), the absence of any reference to injunctive relief in that law, and the contrast between Sections 1983 and 1985(3) with respect to the type of relief that can be awarded, it is unlikely that Congress authorized the courts to award injunctive relief when in 1871 it adopted what is now Section 1985(3). See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 847 (1991); *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2534 (1990). Moreover, this Court has made clear that Section 1985(3) provides no substantive rights itself, and is only

applies only to those conspiracies whose "purpose [is to] depriv[e] * * * any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." Two decades ago, in *Griffin* v. *Breckenridge*, this Court interpreted that clause to mean that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102 & n.10. *Griffin*

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remedial. *Carpenters* v. *Scott*, 463 U.S. at 833; *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 372 (1979). This situation is therefore quite unlike the one that this Court addressed in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). There, this Court addressed the question whether a remedy could be fashioned when a statute, 42 U.S.C. 1982, conferred substantive rights without also authorizing a specific remedy. By contrast, here the substantive right must be found elsewhere; the only purpose of the statute is to provide a remedy; and that remedy by its terms is limited to damages. Nonetheless, some courts have held that injunctive relief is available under Section 1985(3). See *Mizell* v. *North Broward Hosp. Dist.*, 427 F.2d 468, 473 (5th Cir. 1970); *Action* v. *Gannon*, 450 F.2d 1227, 1237-1238 (8th Cir. 1971) (en banc). Neither case, however, is persuasive. *Mizell* relied on a dictum in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 (1968), and on *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. at 238-240, which is inapposite, as explained above. *Action* simply relied on *Mizell*. Several district courts in cases like this one have entered preliminary injunctions, see, *e.g.*, *NOW* v. *Operation Rescue*, 726 F. Supp. 300, 305 (D.D.C. 1989), or permanent injunctions, see, *e.g.*, *Roe* v. *Operation Rescue*, 710 F. Supp. 577, 589 (E.D. Pa. 1989), without addressing the question whether injunctive relief is available under Section 1985(3).

This case does not require the Court to answer that question. Neither court below addressed it; petitioners did not include it as a Question Presented in their certiorari petition; and it does not go to the jurisdiction of the federal courts to adjudicate this case. Under these circumstances, there is no reason to resolve that question here. See *Air Courier Conf. of America* v. *American Postal Workers' Union*, 111 S. Ct. 913, 917 (1991). Nonetheless, because federal officers have been sued under Section 1985(3), see page 2 note 1, *supra*, we mention this question in order to ensure that this Court does not inadvertently resolve it (or suggest that the Court has resolved it) without the benefit of a complete presentation in an appropriate case.

derived its construction of Section 1985(3) from its text and from the legislative history of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, which revealed that Congress did not intend Section 1985(3) to serve as a general federal tort law. 403 U.S. at 101-102 & n.10. Applying that class-based animus requirement, *Griffin* concluded that allegations of a conspiracy to deprive individuals, because of their race, of equal protection of the law, or of equal privileges and immunities under the law, are actionable under Section 1985(3). 403 U.S. at 103. Since *Griffin*, this Court reaffirmed the principle that Section 1985(3) supplies a remedy only for conspiracies motivated by an invidiously discriminatory animus, stating that this conclusion represents "the authoritative construction of the statute." *Carpenters* v. *Scott*, 463 U.S. at 835. See also *id.* at 849 (Blackmun, J., dissenting). See *Kush* v. *Rutledge*, 460 U.S. 719, 725-726 (1983); *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979).[9]

In this case, the district court took two steps in order to characterize petitioners' motives for its anti-abortion demonstrations as an "invidiously discriminatory animus." First, the court held that Section 1985(3) encompasses not only racial animus but gender-based animus as well. Pet. App. 28a-29a. Second, the court ruled that petitioners' efforts to deter pregnant women from having abortions constitutes gender-based animus for purposes of Section 1985(3). Pet. App. 29a-30a. The court of appeals endorsed both propositions, albeit in a summary fashion. *Id.* at 8a. Most of the other courts that have addressed this question have followed the same analysis.[10]

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[9] The *Griffin* requirement that the defendant act with an invidiously discriminatory animus does not also demand, for example, that the plaintiff be a member of a racial minority. A white civil rights worker could recover damages under Section 1985(3) if he was the victim of an assault motivated by bias against blacks.

[10] See, *e.g.*, *New York State NOW* v. *Terry*, 886 F.2d at 1358-1359; *Southwestern Medical Clinics of Nevada, Inc.* v. *Operation Rescue*, 744 F. Supp. 230 (D. Rev. 1989); *Cousins* v. *Terry*, 721

This Court has never decided whether Section 1985(3) reaches gender-based animus.[11] *Griffin* expressly declined

F. Supp. 426, 430 (N.D.N.Y. 1989); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. 165, 169 (D. Or. 1988); *Roe* v. *Operation Rescue*, 710 F. Supp. at 581; *New York State NOW* v. *Terry*, 704 F. Supp. 1247, 1259 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990). Contra *Mississippi Women's Medical Clinic* v. *McMillan*, 866 F.2d 788 (5th Cir. 1989); *National Abortion Fed'n* v. *Operation Rescue*, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989). Cf. *Roe* v. *Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), cert. denied, 484 U.S. 848 (1987).

The courts below did not decide whether Section 1985(3) reaches violations of a right to privacy. Pet. App. 9a, 31a-33a. That question is materially different from the one that those courts discussed in this case. This Court held in *Carpenters* v. *Scott*, 463 U.S. at 831-834, that a plaintiff must prove that a conspiracy involved state action when the conspiracy is directed against a right (there, the First Amendment) that by definition is protected only against state action. "[T]he right to an abortion" discerned in *Roe* v. *Wade* would also fit into that category since it was "derived from the Due Process Clause," *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040, 3058 (1989) (plurality opinion), citing *Roe* v. *Wade*, 410 U.S. 113, 164 (1973); see also *Harris* v. *McRae*, 448 U.S. 297, 312 (1980), which protects individuals only against state action, *Carpenters* v. *Scott*, 463 U.S. at 831-832.

The lower courts are divided on that question. The district court in *New York State NOW* v. *Terry*, 704 F. Supp. at 1260, held that Section 1985(3) encompassed a conspiracy to deny women the right to have an abortion. An Eighth Circuit panel came to the same conclusion, *Lewis* v. *Pearson Foundation, Inc.*, 908 F.2d 318, 322, but that opinion was vacated when rehearing en banc was granted, and the en banc court, by an equally divided vote, affirmed the district court's judgment dismissing the plaintiff's complaint, 917 F.2d 1077 (1990). Most district courts have held that Section 1985(3) does not reach a right to abortion, or have not resolved the issue. *E.g.*, *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. at 168; *Roe* v. *Operation Rescue*, 710 F. Supp. at 583. The Court need not resolve that issue in this case, however, because the lower courts did not do so.

[11] The Members of this Court have divided over this question. Compare *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. at 385 & n.7 (Stevens, J., concurring) (Congress did not envision that Section 1985(3) would reach claims of gender-based animus), with *id.* at 389 n.6 (White, J., dissenting) (Section 1985(3) reaches gender-based discrimination) and *Carpenters* v. *Scott*, 463 U.S. at 853 (Blackmun, J., dissenting) (expressing the view that gender-based animus was a "class trait[]" that met the animus requirement). Several circuit and district courts have held that Section 1985(3) reaches gender-based animus. *New York State NOW* v. *Terry*, 886 F.2d at 1358-1359; *Volk* v. *Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Life Ins. Co. of N. Am.* v. *Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978) (en banc), rev'd on other grounds, 442 U.S. 366 (1979); *Conroy* v. *Conroy*, 575 F.2d 175, 177 (8th Cir. 1978); pp. 9-10 note 10, *supra* (collecting district court decisions). See *Long* v. *Laramie County Community College Dist.*, 840 F.2d 743, 750-752 (10th Cir.) (implicitly assuming that Section 1985(3) reaches gender-based animus), cert. denied, 488 U.S. 825 (1988).

to decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under Section 1985(3). 403 U.S. at 102 n.9. The Court again left that question open in *Carpenters* v. *Scott*, which held that Section 1985(3) does not protect workers who refuse to join a union. The Court wrote that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." 463 U.S. at 836.

On the one hand, nothing in the text of Section 1985(3) indicates an affirmative intention to reach conspiracies based on gender, and it would be fanciful to ascribe such an intent to the 1871 Congress. The immediate object that Congress had in mind for this law was "to combat the prevalent animus [in the South] against Negroes and their supporters." *Carpenters* v. *Scott*, 463 U.S. at 836. Beginning in 1866, the Ku Klux Klan conducted a campaign of assault, terror, and murder against the newly freed slaves and their sympathizers, and became virtually a shadow government in the formerly rebellious States because of the inability or unwillingness of state officials to control the widespread violence. "The Klan's goal was to overthrow Republican Reconstruction policies both by terrorizing local supporters of those policies in

order to place sympathetic Democrats in office, and when that failed by supplanting the authority of local officials with mob violence." *Id.* at 850 n.15 (Blackmun, J., dissenting).[12] For these reasons, the Court has expressed doubt that Section 1985(3) "went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Carpenters* v. *Scott*, 463 U.S. at 837. On the other hand, the breadth of the terms used in the statute—"[a] purpose of depriving * * * any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"—could be read to encompass gender-based animus.[13]

Here, as in *Griffin* and *Carpenters* v. *Scott*, there is no need to answer that question in order to resolve this case, because the judgment below must be reversed for other reasons. Even if Section 1985(3) is broad enough to reach gender-based animus, the actions taken by petitioners are not a form of gender-based discrimination. See pp. 13-20, *infra*. Moreover, describing the class here

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[12] See also, *e.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325, 337-340 (1983); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 610-611 n.25 (1979); *District of Columbia* v. *Carter*, 409 U.S. 418, 425-429 (1973); *Griffin* v. *Breckenridge*, 403 U.S. at 99-102.

[13] The Court has said that "there is some legislative history to support the view that § 1985(3) has a broader reach" than racially based animus alone. *Carpenters* v. *Scott*, 463 U.S. at 836. In this regard, the Court has pointed to a floor statement of Senator Edmunds, the manager of the bill on the Senate floor, that "if a conspiracy were formed against a man 'because he was a Democrat, * * * or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it.'" *Id.* at 836-837, quoting Cong. Globe, 42d Cong., 1st Sess. 567 (1871). At the same time, the Court has noted that "[t]he provision that is now § 1985(3), however, originated in the House. The narrowing amendment, which changed § 1985(3) to its present form, was proposed, debated, and adopted there, and the Senate made only technical changes to the bill." *Carpenters* v. *Scott*, 463 U.S. at 837.

as the class of "women seeking abortions" does not further the analysis under Section 1985(3). See pp. 20-23, *infra*. The courts below therefore erred in concluding that respondents stated a claim against petitioners that could be redressed under Section 1985(3).

B. Opposition To Abortion Is Not An Invidious Class-Based Discrimination Against Women Under Section 1985(3)

1. Operation Rescue and its members do not aim their anti-abortion activities exclusively at women. Rather, as the district court found, petitioners direct their actions at anyone, whether male or female, who assists or is involved in the abortion process—doctors, nurses, counsellors, boyfriends, husbands and family members, staff, and others. Pp. 3-4, *supra*. Indeed, it is more accurate to say that petitioners' activities are targeted at the abortion *process* itself, rather than at persons of any particular gender. Petitioners' goal, the district court noted, is to 'intervene between abortionists and the innocent victims." Pet. App. 20a (quoting *Operation Rescue, National Day of Rescue—October 29, 1988* (1988)). The fact that Operation Rescue's demonstrations are directed toward and operate against both men and women is a strong indication that its actions do not constitute the type of "discrimination" at which Section 1985(3) was aimed.

The Fifth Circuit's decision in *Mississippi Women's Medical Clinic* v. *McMillan*, 866 F.2d 788 (1989), is instructive in this respect. There, abortion protestors picketed a medical clinic that performed abortions, and the clinic sought to enjoin the picketing under Section 1985(3). The court concluded that the clinic was not entitled to an injunction, because the clinic did not show that the protestors acted with "an invidious discriminatory *animus*." 866 F.2d at 794. As the court explained, "the record indicates that the protestors do not target their pro-life advocacy at any particular group. The protestors (who are made up of both men and women) confront and try to persuade to their point of

view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc." *Ibid.* "In fact," the Fifth Circuit pointed out, "the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions." *Ibid.* For these reasons, the Fifth Circuit concluded that the clinic had failed to show that the abortion protestors were motivated by a class-based animus, as required by *Griffin* and *Carpenters* v. *Scott*.

That is likewise the case here, in light of the district court's factual findings. "The purpose of these 'rescue' demonstrations," the district court found, "is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely." Pet. App. 20a. "By disrupting and blockading family planning and abortion clinics," the district court also found, "[petitioners] and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services, and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views." *Ibid.* Those factual findings, which were not disturbed by the court of appeals, reveal that the demonstrations conducted by Operation Rescue have as their motive an opposition to abortion and thus are conducted for a purpose other than animosity toward women.

Petitioners' opposition to abortion also cannot be characterized as gender-based discrimination because that opposition does not implicate all women. Rather, as the district court recognized, petitioners' opposition to abortion implicates only a "subset" of women: those women who seek an abortion or abortion counselling. Pet. App. 29a. That "subset" is in fact a minority of the class of all women, since the district court did not find that most women seek an abortion or abortion counselling. What is more, it is a matter of common knowledge that a considerable number of women share petitioners' moral objections to abortion, and petitioners' demonstrations certainly cannot be viewed as discriminating against those women. For these reasons, the actions petitioners take to prevent clinics from performing abortions are not motivated by a bias against women and do not invidiously discriminate against women *as a class* within the meaning of Section 1985(3). As one court has put it: "[I]f the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender." *National Abortion Fed'n* v. *Operation Rescue*, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989). Just as there is no gender-specific position concerning other moral questions, so, too, there is no specifically "male" or "female" point of view with respect to abortion.

2. Respondents contend it is irrelevant that petitioners' demonstrations adversely affect only women who seek abortions or abortion counselling, instead of substantially all women. Analogizing petitioner's actions to a hypothetical conspiracy involving racial discrimination, respondents note that obstructing access to the polls could not be defended on the ground that it was directed at only those blacks who seek to exercise their right to vote. Br. in Opp. 10. See *New York State NOW* v. *Terry*, 886 F.2d at 1359-1360. That analogy is erroneous, however, for several reasons.

As explained above, petitioners' demonstrations are not directed exclusively at the women who seek an abortion or abortion counselling; these demonstrations are targeted at everyone—male or female—involved in the abortion process. Respondents also overlook that a substantial number of women oppose abortion. That fact distinguishes this case from *Griffin* v. *Breckenridge*, in which there was no suggestion that a substantial number of blacks opposed granting blacks the right to vote. In other words, petitioners' anti-abortion demonstrations are not a form of gender-based discrimination because they are aimed at a *practice*, not at a type of *person*.

3. The Second Circuit in *New York State NOW* v. *Terry*, 886 F.2d at 1359-1360, and most district courts

that have addressed this question appear to have believed that opposition to abortion is necessarily a form of gender-based discrimination because only women can have abortions. That conclusion, however, rests on a mistaken assumption—that actions with a disproportionate effect on women inevitably discriminate invidiously on the basis of gender. What is true for purposes of the Equal Protection Clause is also true in the case of Section 1985(3): What transforms action having a disproportionate effect on women from the byproduct of otherwise legitimate conduct into invidious discrimination against women per se is the *intent* to disadvantage women as a class of individuals. See *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-268 (1977); *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 278-279 (1979). Section 1985(3) does not require a "specific" or "willful" intent to harm class members, as this Court noted in *Griffin*, 403 U.S. at 102 n.10. At the same time, Section 1985(3) is violated only when an individual acts, with or without "scienter," 403 U.S. at 102 n.10, for the purpose of injuring a member of a protected class. The "discriminatory purpose" relevant for the Equal Protection Clause and Section 1985(3) "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r* v. *Feeney*, 442 U.S. at 279 (citation and footnote omitted). That is what *Griffin* meant by its requirement that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102 & n.10.

Two cases in which this Court has addressed whether pregnancy-based discrimination constitutes gender-based discrimination supply a useful illustration of this point. For example, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court rejected the contention that a state disability

insurance program violated the Fourteenth Amendment Equal Protection Clause by excluding from coverage pregnancy-related disabilities, even though only women can become pregnant. The Court found that the program was "a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such." *Geduldig* v. *Aiello*, 417 U.S. at 496-497 n.20. This Court reasoned as follows, *ibid.*:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Two years later, in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the Court relied on *Geduldig*'s reasoning in the course of rejecting a challenge based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to a comparable private disability plan. The Court in

Gilbert interpreted *Geduldig* as having held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not gender-based discrimination at all." 429 U.S. at 136. See also *id.* at 134-135.

Although *Geduldig* did not involve Section 1985(3), the Court's reasoning in that case is applicable here. In fact, this Court's analysis in *Geduldig* applies even more forcefully in the abortion context. Here, as in *Geduldig*, there are two relevant categories—persons involved in the abortion process, and everyone else—and neither class is exclusively female; each category includes both women and men. The analysis in *Geduldig* therefore strongly shows that petitioners' demonstrations are attributable to a factor other than gender-based animus, and, perhaps not surprisingly, as discussed above the district court's factual findings confirm that hypothesis. In sum, just as the insurance programs in *Geduldig* did not discriminate on the basis of gender even though only women can become pregnant, petitioners' opposition to abortion is not gender-based even though only women can have abortions.[14]

To be sure, Congress overruled *General Electric Co.* v. *Gilbert*, *supra*, by adopting the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076,

[14] A different question would be presented if respondents proved that petitioners directed their anti-abortion efforts specifically and exclusively at women because petitioners held an invidiously discriminatory animus against women as a class. Were that true, the demonstrations put on by petitioners would be simply a pretext for discriminating against women, and *Geduldig* v. *Aiello*, 417 U.S. at 496-497 n.20, indicates that such conduct would amount to gender discrimination. Accord *General Electric Co.* v. *Gilbert*, 429 U.S. at 135-136. But respondents made no such allegation in this case; the district court made no such finding; and none of the findings that the district court did make would support a claim of pretext. In fact, the district court expressly found that petitioners were sincerely committed to protecting the fetus and did not find that petitioners harbored any animosity toward women as such. In the district court's words: "It is indisputable that all [petitioners] share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." Pet. App. 20a. Given that finding, no claim of pretext can be made in this case.

which prohibits employment discrimination on the basis of pregnancy. 42 U.S.C. 2000e(k) (defining discrimination "because of sex" and "on the basis of sex" *under Title VII* to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions"). See *International Union, United Automobile, Aerospace & Agric. Implement Workers of America* v. *Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983). Congress has therefore drawn a line for purposes of Title VII that differs from the one that this Court drew for equal protection purposes in *Geduldig*. For several reasons, however, the rationale of *Geduldig* is still applicable in this context.

First, the Pregnancy Discrimination Act of 1978 by its express terms did not modify Section 1985(3), which this Court has understood to be aimed at the same kind of invidious discrimination at which the Equal Protection Clause is directed. See *Griffin* v. *Breckenridge*, 403 U.S. at 102; *Carpenters* v. *Scott*, 463 U.S. at 829. Accordingly, the decision in *Geduldig*, 417 U.S. at 496-497 n.20, is still directly relevant. Moreover, regardless of how the Equal Protection Clause should be applied in other settings, this case involves abortion, which is critical to any proper analysis. Even if the Pregnancy Discrimination Act tells us that pregnancy-based decisions that adversely affect women are discriminatory per se, there certainly can be no doubt that opposition to abortion is not, without more, gender-based discrimination. The reason is that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980). The Pregnancy Discrimination Act itself recognizes that point, because it does not generally compel employers to subsidize abortions for their female employees. 42 U.S.C. 2000e(k) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus

were carried to term, or except where medical complications have arisen from an abortion * * *.").

There are more interests at stake in the abortion decision than those of the pregnant woman. The government has a legitimate interest in protecting both the unborn child and the health of the mother, *Harris* v. *McRae*, 448 U.S. at 324-325; *Roe* v. *Wade*, 410 U.S. 113, 162, 164-165 (1973); the parents of a pregnant minor have a valid interest in participating in their daughter's decision whether to carry her pregnancy to term, *Hodgson* v. *Minnesota*, 110 S. Ct. 2926 (1990); and the father of the child has a personal interest in the pregnant woman's decision. Thus, unlike the condition of being pregnant, the "right" to have an abortion is not a fact that is specific to one gender. Instead, it is a legal right as to which the law can properly assign different interests to various parties.

4. Finally, there can be no serious argument that the 42nd Congress, which passed the Ku Klux Klan Act of 1871, would have believed that Section 1985(3) could be used to obtain damages for actions like those challenged here. The abortion of a fetus after "quickening" was a crime at common law, and state laws condemning or limiting abortion were common when that Act was adopted. In 1871, 28 of 37 States and 8 Territories had such laws. *Roe* v. *Wade*, 410 U.S. at 132-136; *id.* at 174-176 & n.1 (Rehnquist, J., dissenting). Under these circumstances, it is safe to say that "the construction of the statute adopted by the Court of Appeals 'would have amazed the legislators who voted for it.'" *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. at 385 n.7 (Stevens, J., concurring) (citation omitted).

C. Defining The Category As "Women Seeking Abortions" Does Not Further The Correct Analysis Under Section 1985(3)

The district court's opinion also could be read as holding that the class of "women seeking abortions" is a protected class under Section 1985(3). Pet. App. 29a

("[Respondents'] members and patients constitute a subset of a gender-based class meeting these requirements [of *Griffin*]."). Other courts have also defined the protected class in that manner.[15] That description of the class of individuals affected by petitioners' anti-abortion demonstrations, however, does not further analysis of the Section 1985(3) question in this case.

If a Section 1985(3) class could be defined by what its members *do* rather than by who its members *are*, as the district court concluded, a plaintiff could always (and easily) allege that he is a member of a class protected by Section 1985(3) merely by claiming that he belongs to a "class of persons who seek to engage in some action that the defendants have combined to resist through tortious means." For example, animal rights advocates could become a class protected by Section 1985(3) by defining themselves as "individuals who seek to prevent animal cruelty." Likewise, female military personnel could bring themselves under the protection of Section 1985(3) merely by defining themselves members of a subclass of "women who seek to participate in combat."

No material difference exists between the hypothetical classes mentioned above and the class recognized by the district court of "women seeking abortions." A class of "women" describes a group with an immutable characteristic, but a class of "women seeking abortions" is defined in part by reference to the actions of its members, those who seek abortions. That definition is an insufficient basis for allowing a person to obtain relief under Section 1985(3). This Court has determined that a class may not be defined simply by reference to the fact that its members are victims of a conspiracy or hold beliefs that differ from ones held by the co-conspirators. *Carpenters* v. *Scott*, 463 U.S. at 834-835. See *Roe v. Abor-*

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[15] See, *e.g.*, *Cousins* v. *Terry*, 721 F. Supp. 426, 430 (N.D.N.Y. 1989); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. at 168; *Roe* v. *Operation Rescue*, 710 F. Supp. at 581. Contra *National Abortion Fed'n* v. *Operation Rescue*, 721 F. Supp. at 1171-1172.

tion Abolition Society, 811 F.2d 931 (5th Cir.), cert. denied, 484 U.S. 848 (1987). The Court wrote in *Carpenters* v. *Scott*, 463 U.S. at 850 (citation omitted), that "the intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class. Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious act." The approach endorsed below, however, allows a plaintiff to circumvent that rule by alleging, not that she is the victim of the defendant's tortious acts, but that she engaged in conduct that (coincidentally) caused her to fall victim to the defendant's tort.

Petitioners' opposition to abortion in this respect resembles the class rejected in *Carpenters* v. *Scott*: workers who refused to join a union. 463 U.S. at 839. That category, like the class of "women seeking abortions" asserted here, was defined by nothing more than a mutual desire to exercise a legal right, rather than an immutable characteristic, such as race. To permit such a "class" to invoke Section 1985(3) clearly would reduce the class-based animus requirement adopted in *Griffin* and reaffirmed in *Carpenters* v. *Scott* to nothing more than a rule of artful pleading, and in the process would make Section 1985(3) a "general federal tort law," contrary to that statute's language, purpose, and history. See *Carpenters* v. *Scott*, 463 U.S. at 834-836; *Griffin* v. *Breckenridge*, 403 U.S. at 102.

In sum, defining the class as "women seeking abortions" does not further the analysis, since petitioners conduct demonstrations for the purpose of stopping clinics from performing abortions, not to injure women because of their gender. Even if women are a class protected by Section 1985(3), defining the relevant class in terms of an activity in which women alone can engage does not prove that petitioners' intent is invidious. The fact remains that abortion is a medical procedure that fits into a category all by itself, and it is for the purpose of bringing that singular procedure to a halt that petitioners hold their demonstrations. That intent does not satisfy the animus requirement of *Griffin* and *Carpenters* v. *Scott*.

II. OBSTRUCTING ACCESS TO A MEDICAL FACILITY DOES NOT WITHOUT MORE DEPRIVE OUT-OF-STATE PATIENTS OF THE CONSTITUTIONAL RIGHT OF INTERSTATE TRAVEL

A. The Right To Travel Interstate Is Not Violated In The Absence Of Proof That The Defendant Has Purposefully Discriminated Against Persons Who Travel Interstate

1. In *Griffin* v. *Breckenridge*, this Court ruled that the right to travel interstate—what the Court there termed "the 'right to pass freely from State to State' "—was protected by the Constitution. 403 U.S. at 106, quoting *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908). According to *Griffin*, this Court's decisions have "firmly established that the right of interstate travel is constitutionally protected," that this right "does not necessarily rest on the Fourteenth Amendment," and that it "is assertable against private as well as governmental interference." 403 U.S. at 105.[16] Finally, *Griffin* also concluded

[16] *Griffin*'s statement that the right to travel interstate "does not necessarily rest on the Fourteenth Amendment," 403 U.S. at 105, understates the uncertainty in this Court's decisions about the source of this constitutional right. Various decisions have located this right in the Privileges and Immunities Clause of Art. IV, § 2, see *Corfield* v. *Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J., Circuit Justice); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 43-49 (1867); *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873); *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908); *Zobel* v. *Williams*, 457 U.S. 55, 78-81 (1982) (O'Connor, J., concurring in the judgment); *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting); the Privileges and Immunities Clause of the Fourteenth Amendment, see *Edwards* v. *California*, 314 U.S. 160, 177, 181-182 (1941) (Douglas and Jackson, JJ., concurring); the Commerce Clause of Art. I, § 8, Cl. 3, see

that the right to travel interstate "is within the power of Congress to protect by appropriate legislation." *Id.* at 106, citing, inter alia, *United States* v. *Guest*, 383 U.S. 745, 759 (1966).

The district court held that petitioners' demonstrations violate the rights of women to cross state lines in order to obtain abortions in the Washington, D.C., area, Pet. App. 30a, and the court of appeals affirmed that holding, *id.* at 8a. Significantly, however, there is no factual finding below that one of petitioners' principal goals is directly to interfere with respondents' right to travel interstate, or that interfering with respondents' right to travel interstate is a conscious part of petitioners' strategy of opposing abortion. Nor did the courts below conclude that petitioners' actions in any way discriminated against out-of-state residents.

By finding a violation of the right to travel interstate in the absence of any of the above elements, the courts below expanded that right beyond anything previously recognized in this Court's decisions. Most of this Court's

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The Passenger Cases, 48 U.S. (7 How.) 283 (1849); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) at 49 (opinion of Clifford, J.); *Edwards* v. *California*, 314 U.S. 160 (1941); the Due Process Clauses of the Fifth and Fourteenth Amendments, see *Kent* v. *Dulles*, 357 U.S. 116, 127 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-506 (1964); *Shapiro* v. *Thompson*, 394 U.S. 618, 671 (1969) (Harlan, J., dissenting); cf. *Califano* v. *Aznavorian*, 439 U.S. 170, 176 (1978); *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981); and the Equal Protection Clause of the Fourteenth Amendment, see *Zobel* v. *Williams*, 457 U.S. at 60 n.6; *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985). See generally *Shapiro* v. *Thompson*, 394 U.S. at 630 n.8; *id.* at 666 (Harlan, J., dissenting); *United States* v. *Guest*, 383 U.S. at 762-770 (opinion of Harlan, J.). See *Attorney General* v. *Soto-Lopez*, 476 U.S. at 902 ("The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration * * * has proved elusive."); *Zobel* v. *Williams*, 457 U.S. at 60 n.6 ("The right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right have remained obscure."). In sum and in truth, to borrow a metaphor from Judge Friendly, the constitutional right to travel is a legal Lohengrin: no one knows from whence it came. Cf. *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

recent interstate travel cases "have dealt with state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents." *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion), citing *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel* v. *Williams*, 457 U.S. 55 (1982); *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Yet as noted above, respondents did not allege that petitioners' activities somehow classify women seeking abortions according to their residence, or result in the unequal distribution of abortions performed in and among the various States represented in the District of Columbia metropolitan area.

In the absence of discrimination against out-of-state residents, this Court has found a violation of the right of interstate travel only when it was proven that a defendant intended to violate that right as one of his principal goals. For example, the Court in *Griffin* v. *Breckenridge*, 403 U.S. at 106 (emphasis added), allowed plaintiffs to take their interstate travel claim to trial because it was open for them to prove at trial that "their federal right to travel interstate was one of the rights *meant* to be discriminatorily impaired by the conspiracy, that the conspirators *intended* to drive out-of-state civil rights workers from the State, or that they *meant* to deter the petitioners from associating with such persons." Similarly, in *United States* v. *Guest*, *supra*, this Court upheld an indictment under 18 U.S.C. 241 [17] that alleged a

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[17] 18 U.S.C. 241 generally tracks Section 1985(3). It provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his

conspiracy to interfere with the right to travel. See 383 U.S. at 757. In so doing, the Court explained, *id.* at 760 (emphasis added):

> [A] conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the *predominant purpose* of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person *because of* his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.

Under 18 U.S.C. 241, as under Section 1985(3), an effect on individuals travelling interstate does not suffice to state a claim based on interference with the right to travel interstate.[18]

It is easy to understand why the Court has been careful to limit the right to interstate travel in the above manner. If that right encompassed *any* activity that had *any* effect on interstate travel, almost every public or private action could be transformed into a violation of the federal constitutional right. For example, a health code inspector and restaurant owner who conspire to close a competitor's restaurant allegedly for health code violations, or two arsonists who conspire to destroy a restaurant, evidently would be trenching on the right to travel interstate, because they would have made it impossible for out-of-state customers to enter a State to do business

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free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

[18] See also *Shapiro* v. *Thompson*, 394 U.S. at 629, 631 ("the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible.").

with the restaurant owner. Airline travelers would have a constitutional cause of action for damages against airline companies each time two companies conspire to hike their fares on interstate flights, since higher fares make it more expensive and, hence, more difficult to travel interstate. Similarly, lifeguards who go on strike in order to close a summer beach resort violate the constitutional rights of every person who would otherwise have traveled across state lines to spend a vacation at the beach. The potential for such claims is limitless. Cf. *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Although *Griffin* acknowledged that the actions of private parties can give rise to a damages action under Section 1985(3), it would be a mistake to equate the actions of private parties with those of the State in all instances. Cf. *United States* v. *Guest*, 383 U.S. at 772 (Harlan, J., concurring in part and dissenting in part) ("There is a difference in power between States and private groups so great that analogies between the two tend to be misleading. If the State obstructs free intercourse of goods, people, or ideas, the bonds of the union are threatened; if a private group effectively stops such communication, there is at most a temporary breakdown of law and order, to be remedied by the exercise of state authority or by appropriate legislation.") That is not to say that a plaintiff must prove he was in fact deterred from travelling interstate, or that temporary deprivations are permissible. On the contrary, "even temporary deprivations of very important benefits and rights can operate to penalize migration." *Attorney General* v. *Soto-Lopez*, 476 U.S. at 907 (plurality opinion), citing *Shapiro*, *Memoriai Hospital* v. *Maricopa County*, and *Dunn*, all of which involved residency requirements. The point is that ordinary torts should not be deemed to give rise to a constitutional claim simply because they may have some effect on persons who travel interstate.

2. The cases in which the Court has found a violation of the right to travel in the abortion context are consist-

ent with the limitations that the Court has imposed on that right elsewhere. For example, *Doe* v. *Bolton*, 410 U.S. 179 (1973), held invalid a Georgia law excepting from the State's general criminal abortion law abortions performed on state residents. *Id.* at 184, 200. Because the statute in *Doe* discriminated against out-of-state residents, that case, like *Soto-Lopez*, *Hooper*, *Zobel* and the other cases cited above, involves the unequal distribution of rights based on residency classifications.

In *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), the Court struck down under the First Amendment a Virginia statute prohibiting any person, by the sale or circulation of any publication, to encourage the processing of an abortion. The defendant in *Bigelow* was the managing editor of a weekly newspaper that published, in Virginia, a New York City organization's advertisement that it would arrange low-cost abortions in New York City. In holding that law invalid, this Court stated that it was lawful for Virginia residents to take advantage of the abortion services advertised in petitioner's newspaper because, among other reasons, Virginia could not "prevent its residents from traveling to New York to obtain [abortion] services or • • • prosecute them for going there." 421 U.S. at 824, citing *United States* v. *Guest*, 383 U.S. at 757-759; *Shapiro* v. *Thompson*, 394 U.S. at 629-631; *Doe* v. *Bolton*, 410 U.S. at 200. For a State either to "prevent" its citizens from travelling to another State, or to prosecute them after-the-fact for making such a trip, would directly and purposefully interfere with their right of interstate travel in a manner similar to what transpired in *Griffin* and *Guest*. Indeed, it is particularly noteworthy that *Bigelow* focused on those forms of interference with the right to travel interstate. Theoretically, a State could interfere with a woman's right to travel interstate to obtain an abortion in any number of indirect ways, such as by raising highway taxes, thereby making it more expensive to travel. But this Court steered far clear from recognizing such an

indirect, nonpurposeful violation of the right to travel, perhaps because virtually any State or private action could trigger a damages action were such claims allowed.

B. Petitioners' Demonstrations Did Not Violate Respondents' Right To Travel Interstate

In this case, the district court did not find as a fact that petitioners hold demonstrations *for the principal purpose of* directly preventing respondents from exercising their right to travel interstate, nor did either court below conclude that petitioners' actions discriminated against out-of-state residents. Petitioners' actions, according to the court's below, were tortious under Virginia law, but those actions did not constitute a violation of respondents' right to travel interstate under the federal Constitution. Accordingly, the judgment below should be set aside.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1991

APPENDIX

STATUTE INVOLVED

42 U.S.C. 1985(3), which was originally enacted as Section 2 of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, provides as follows:

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

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Case No. 90-985

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAYNE BRAY, et al,

Petitioners,

vs.

ALEXANDRIA WOMEN'S HEALTH CLINIC, et al,

Respondents.

On Petition for Writ of *Certiorari*
To the United States Court of Appeals For the Fourth Circuit

BRIEF OF JAMES JOSEPH LYNCH, JR., AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONER

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AMICUS CURIÆ PRO SE

QUESTIONS PRESENTED

By *Amicus Curiæ*:

(1) Should *Roe v. Wade*, 410 U.S. 113 (1973) be reconsidered and discarded in favor of finding that a fetus is a member of Posterity, therefore a person in the Constitutional sense, and thus entitled to the protection of the Constitution?

As framed by the parties (59 LW 3508):

(2) Do "women seeking abortions" constitute a valid class for purposes of "class animus" requirement of 42 U.S.C. § 1985(3)?

(3) Is opposition to abortion per se discrimination against women for purposes "class animus" requirement of 42 U.S.C. § 1985(3)?

(4) Do purely private actors who hinder access to abortion facility violate federal constitutional right to interstate travel merely because some patrons of facility come from out of state?

(5) Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive federal courts of subject matter jurisdiction?

(5) Did court of appeals err by sustaining award of attorney's fees against petitioners?

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Case No. 90-985

SUPREME COURT OF THE UNITED STATES

October Term 1989

JAYNE BRAY, et al,

Petitioners,

vs.

ALEXANDRIA WOMEN'S HEALTH CARE CLINIC, et al,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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BRIEF OF JAMES JOSEPH LYNCH, JR., AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*

Amicus is an attorney admitted to practice law in the highest court of the State of California, and a member of the Bar of this Court. He has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He also presented a similar *Amicus Curiæ* Brief in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), in support of appellant, and in behalf of other states.[1] He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He is

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[1] *Hodson v. Minnesota*, No. 88-1125 and *Minnesota v. Hodson*, No. 88-1309, and *Ragsdale v. Turnock*, No. 88-790. Since *Webster* consented, Ohio's deputy Attorney General is the sole deputy Attorney General to refuse consent.

affiliated with, but does not represent, a number of pro-life groups and has himself concentrated his practice in the areas of Civil Rights Law, Human Rights Activities, Constitutional Law, and Criminal Defense. He has written and copyrighted one article on Abortion entitled *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy*. He lived four years in England where he engaged in a self directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

This case touches and concerns the continuing validity of *Roe v. Wade*, and its progeny, and, as such, a decision herein will affect not only the Laws in the Metropolitan Washington Area and of the State of Virginia, but the State of California wherein *amicus* resides, because it effects the rights of persons residing in California, the liability of the state, and its taxpayers, may or may not, be liable for damages depending upon the scope of rights belonging to a fetus, which in *amicus*' belief constitutes human life protected by the Constitution. It must be remembered that under Nazi Germany, nearly 9 million innocent lives were lost in a holocaust because no one, at the outset had the courage to say no.[2] If. as contended here, a fetus is a human life, then *amicus* has an interest as a taxpayer to insure that his state's procedures are neither *contra bono mores*, nor illegal.

Amicus is also concerned about the rights of that class of persons recognized in the Preamble of the Constitution denominated "posterity", and its subclass "fetus" and is concerned, and has been concerned for some time, that fetuses, have been unrepresented or under-represented in any court in the years of litigation which has followed since *Roe v. Wade* was decided in this court in 1973. *Amicus* was convinced then, and remains convinced, that the court was misled as to the meaning of personhood in that arguably a fetus is a member of Posterity found in the Preamble of the Constitution, and that it is

[2] It is certain that the atrocities began at least as early as 1938. 6 Enclopædia Britanica 253a (1971). World War II did not start until September 1, 1939, by the Nazi, with United States entry on December 8, 1941 and then only because of events in Hawaii. 22 Id 681b, following.

imperative, for the preservation of a basic respect for human life, and the values enshrined in the Constitution of the United States that fetuses be recognized as a member of Posterity, but, until *Webster*, due to the inherent nature of our adversary process, has been limited to writing articles concerning the topic.

STATEMENT OF THE CASE

Plaintiffs, respondents in this court, consist of a class of nine clinics in the Washington metropolitan area and Northern Virginia that provide various abortion-related services, and five organizations that seek to preserve a woman's alleged right to obtain an abortion. Defendants, Petitioners in this court, are organizations and individuals associated with Operation Rescue, an organization whose purpose is to prevent abortions and to oppose their legalization. One of the ways Petitioners herein, seek to effectuate these goals is to stage "rescue" demonstrations at abortion facilities. At these demonstrations, the participants attempt to rescue the life of fetus about to be destroyed by dissuading and preventing women from entering the abortionaries. Defendants, Petitioners in this court, claim the amount of force used is reasonable in light of the danger to the life of fetus to be taken without justification or excuse. 914 F.2d 583, 584 (4th Cir., 1990), 726 F.Supp. 1483, 1487-88.

The district court found for plaintiffs and imposed an injunction, finding, in relevant part "that the defendants' blockading of abortion facilities infringed the right to travel of women seeking to obtain abortions at clinics in the Washington metropolitan area, in violation of 42 U.S.C. § 1985(3), and certain of their rights under state law." 726 F.Supp. 1483.

The court of appeals affirmed "because the district court found that the activities of appellants in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law." 914 F.2d 585.

SUMMARY OF ARGUMENT

1. This Court has recognized that unconstitutional conduct which has been widespread and in long use cannot stand, and that with respect to the Constitution, *stare decisis* is of less importance than in other cases, and therefore the holding of *Roe v. Wade* is not necessarily binding on this Court, and in fact should be rejected for reasons set forth hereinafter.

2. While the Preamble of the Constitution does not create any rights, it defines for whom the rights were created - Ourselves and Our Posterity, and a construction that Posterity includes fetuses is consistent with the intent of the framers and the common law understanding that a fetus was a person in being, such that a fetus is a person in the Constitutional sense, and because this was not brought to this Court's attention in *Roe v. Wade*, *Roe v. Wade* must be overruled as unsound and contrary to the intent of the framers.

3. Because a fetus is human life and a person in the constitutional sense and a person has the common law right to defend the life of a third person about to be taken without justification or excuse, on the record before the court, the court erred because there is no showing of unreasonable force in light of the willful and wanton taking of human life in the form of a fetus.

Conclusion. Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, reverse the decision of the Fourth Circuit at 914 F.2d 583 as to the rights of women to have abortions, and remand for further proceedings not inconsistent with this Court's opinion.

ARGUMENT

I

STARE DECISIS IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE

Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). This court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal" facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by this Court, this Court *overruled*, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown II*). *Accord*, *Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown II*, 347 U.S., at 488-89, 496 (1953); *Brown v. Board of Ed.*, 349 U.S. 294, 298 (1955) (*Brown III*) (Nature of remedy).

Such is the case at bench. This court can judicially notice its own docket, which has been impacted by abortion cases. Similarly, it is common news that throughout the country, abortion controversy has led to disorder in the streets.[3] Moreover, the *Roe Decision* has proved to be unsound in principal, and unworkable in practice. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989).

Thus, this court, with the characteristic good grace it exhibited in *Garland*, should now recognize, for reasons which will become apparent hereinafter, that in *Roe v. Wade*, 410 U.S. 113 (1973) it was misled, *overrule* it prospectively, and remand

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[3] It is not suggested that the disorder is the reason for overruling Roe. Quite the contrary, the reason is because a fetus is a person in the Constitutional sense by virtue of the term Posterity found in the Preamble. The notation of the problem is put a recognition that the problem must be resolved.

for further proceedings in light of the fact that the fetus is, by virtue of the term Posterity, found in the Preamble of the Constitution, a person in the Constitutional sense.

II

A FETUS IS A PERSON IN THE CONSTITUTIONAL SENSE BY VIRTUE OF THE TERM POSTERITY IN THE PREAMBLE OF THE CONSTITUTION

A. Introduction - *Roe v. Wade* Did Not Consider Posterity.

This court in *Roe v. Wade*, 410 U.S. 113 (1973), *held* that a state had no right to regulate abortions in the first trimester of pregnancy in view of the right of privacy of the mother, could provide some regulation in the second trimester, and had the right to full regulation in the third trimester. In reaching this result, the court noted that Texas had failed to demonstrate where in the Constitution the fetus was a person in the Constitutional sense. 410 U.S., at 157-59. A reading of the Petition, Response, and Briefs on the merits by the parties and *amicus* in *Roe v. Wade*, shows that the primary focus of argument was on the term person as found in the 5th and 14th Amendments of the Constitution. 75 Landmark Briefs and Arguments of the Supreme Court of the United State. The opinion itself does not address the Preamble, nor any of the terms found in the preamble.

This court has used the term "posterity" on one prior occasion, *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550 (1876); but has never before been called upon to define the term, and to, or for, whom it was intended to include.

In at least one subsequent opinion, this court has held that the right of privacy cannot be used by consenting adults in the privacy of their own bedroom to engage in homosexual conduct forbidden by State Law. *Bowers v. Hardwick*, 478 U.S. 186 (1986). There is no case that has ever reported that a female, based on her right to privacy, can do whatever she wishes with her body, including acts of prostitution in the privacy of her

own bedroom in violation of state law. *A fortiori*, if the fetus is a person in the Constitutional sense, it does not seem reasonably possible that a woman can, absent justification or excuse, take the life of a fetus in violation of state law.

This court recently in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989) held that the statutes therein which withheld public funds, employees, and facilities from use in non-therapeutic abortions did not offend the Constitution. In doing so, it was noted that the decision all but wipes *Roe* off the books as an unconditional right to an abortion. *Id*, (Scalia, J., concurring).

B. While the Preamble Does not Create Rights, it does define for Whom the Rights were Created

The Preamble's true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. *United States v. Boyer*, 85 F. 425 (D.C., Mo., 1898) (Quoting Mr. Justice Storey on the Constitution, Section 462). *Cf., Hockett v. State Liquor Licensing Board*, 110 N.E. 485, 91 Ohio St. 176, L.R.S. 1971B, 7 (1915). That aside, it does define for whom the constitution was created, and where sovereignty resides. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 404 (1857);[4] *Cruikshank, supra*, 92 U.S. (2 Otto), at 549.

C. The Constitution was Established "By The People"

The Constitution,[5] in the Preamble, declares that "We the

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[4] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

[5] In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141, 145 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85

People"[6] do ordain and establish this Constitution. "Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservation, 'We, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principle figure in several of our State bills of rights and which would sound much better in a treatise of ethics than a constitution of government." Hamilton, The Federalist Papers, No. 84.; Preamble, *Amicus* Appendix, p. A7.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold power and conduct the government through their representatives. They are

(1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938); *Knowlton v. Moore*, 178 U.S. 87 (1900). Words and terms are to be taken in the sense they were used and understood at common law and at the time the constitution and the amendment were adopted. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall.) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Weat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 313 U.S. 299, 316 (1941).

[6] Recorded history first notes that a sovereign rules with the consent of the governed in I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. There, David as a youth was anointed as the successor to Jesse, his father. When his father died, he ruled over the seven tribes of Judah for seven years. At that time, when the rest of Israel were doing poorly, they noted that Judah prospered under David, so they asked that he rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. But there is nothing to indicate the right to rule was in writing. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. Thus, the *Magna Carta*, *infra*, appears to be the first written document executed by both the sovereign and its subjects. The U.S. Constitution abolished traditional concepts of sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures. *Infra*.

what we familiarly call the "sovereign people" and every citizen is one of these people, and constituent member of this sovereignty. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 404 (1857);[7] *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

D. The Preamble Creates Two Classes of Persons, on an Equal Footing - "Ourselves" and "Posterity"

There being no debate, and the question of the meaning "to ourselves and our Posterity" being one of first blush, we must turn to the meaning commonly understood at the time of the adoption to determine its extent and application. *Gibbons v. Ogden*, 22 U.S. (9 Weat.) 1, 188-189 (1824); *Locke v. New Orleans*, 71 U.S. (4 Wall) 172 (1866); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall) 533, 542 (1869); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852).

The phrase in question begins with the preposition "to". As so used, it marks the object for which the purposes were secured. Webster's Dictionary of the English Language (1968).

"Ourselves" is a pronoun, the plural of "ourself", and when used in the objective, as here, it simply serves as the reflexive pronoun corresponding to "we" or "us". *Ibid.* "We", in this case, appears at the beginning of the preamble and is defined by the parenthetical statement immediately following "the People of the United States." "Ourselves" is therefore synonymous with "the people of the United States" and hence also "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 393, 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

"And" is a particle joining words and sentences, and expressing the relations of connection or addition. Webster's, op. cit. In this case, its purpose is to add to the object for which the

[7] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

purposes were secured. "Our" means of, or belonging to, "us", i.e., to the speaker (in this case "We, the People of the United States), or to the speaker and the person or persons whom he speaks for or includes. It is a possessive adjective corresponding to "We", "Us"; expressing the genitive of possession; also, the objective genitive, as in "our defense", "our Maker", "our persecutors". Oxford English Dictionary, Compact Edition, 1971. (Hereinafter, OED). Its purpose is to include "Posterity" on an equal footing with, and the same rights as, "our selves" as evidenced by the parallel structure of the phrase. Therefore, "posterity" is synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 393, 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

E. Posterity Was Understood At the Time of Adoption to Include All Future Generations

"Posterity", at the time of the drafters were writing the Constitution, was defined as "1. The descendants collectively of any person; all who have proceeded from a common ancestor. 2.+.a. A later generation (with plural). obs. b. All succeeding generations (collectively)." OED, op. cit. *Accord, Breckenridge v. Denny*, 71 Ky (8 Bush.) 523.

The Preamble is not concerned with an individual in particular, as in 1. Nor in the sense of 2.a, which in any event is obsolete. 2b appears to be the sense which the framers had in mind. Samuel Johnson, "Idler No. 3", p. 5, used it in that sense in 1758 when he wrote, "The Ocean and sun will last our time, and we may leave posterity to shift for themselves." It was again used in that sense by Colquhounn in Commentaries on the Thames, ix, 284 when he wrote in 1800 "They will deserve the Thanks of the Nation, and the gratitude of Posterity." OED, op. cit.

The Constitution was signed on September 17, 1787, and Congress on February 18, 1791 formally recognized that the states had ratified the Constitution and therefore it was in effect. 3 Rotunda, Treatises on Constitutional Law, pp. 663-64, note 1. Thus it may be assumed the same sense was intended. *Ante*, footnote 5, and the citations therein.

F. That a Fetus was intended as a member of Posterity is Consistent with Common Law Tradition.

The Framers used the term Posterity without qualification. In 1644, in a well known pamphlet, it was argued that "Parliament can no more censure the issue of the mind than it can the issue of the womb." Milton, John, "Aeropagitica" (1644).[8] At common law, it was understood that certain members of future generations, fetuses,[9] were a life in being for the purposes of the Rule Against Perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). Moreover, prenatal injuries, were to a limited extent, recognized at Common Law. "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and death by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198.[10] And common law does not appear to have barred tort actions for prenatal injuries. *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960).

It thus appears that the framer's intended that "All succeeding generations (collectively)" include common law con-

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[8] Milton went on to observe that he did not believe that his remarks applied to Catholics. While this Catholic takes exception to the exception, his premise appears sound in all other respects. It may be that today he would have different feelings on the matter.

[9] That a fetal has rights was probably recognized as early as 322 BC. Aristotle, *Politics*, VII, 1335b, 24-26; Acquinas, *Summa Theologiæ*, 1, q. 76, a. 5 and q. 118, a. 2; Noonan, Contraception, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy for anyone causing a miscarriage. 21 Exodus 22. It does not offend the Establishment Clause of the 1st Amendment merely because civil enforcement corresponds to the tenants of some religious belief. *Generally, Harris v. McRae*, 448 U.S. 297, 319, 320 (1979); *Witters v. Washington Dept. of Social Svcs for the Blind*, 474 U.S. 481 (1986).

[10] Lord Coke's rationale rested on the impossibility of determining when life began, hence there would always be reasonable doubt as to whether or not murder had been committed. Two reasons may be advanced for that. First, at common law, "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Article 54. Thus, a failure of evidence. Second, medical knowledge as to the status of a fetus was quite primitive when compared to modern medical practices. See footnote 27.

cepts of the rights of a fetus and to be synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 393, 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

G. That a Fetus was intended as a member of Posterity is Consistent with the known object and Purposes of the Framers.

As the Preamble appears to confer rights upon "posterity" equal to "ourselves", it is necessary to determine whether the framer's[11] intended that the rights be vested. *Ante*, footnote 5, and the cites therein. One measure of intent would be to determine whether vesting has occurred for the purpose of the rule against perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with the powers of alienation. But such a concept would have been inconsistent with the concept of "unalienable rights" found in the Declaration of Independence[12] and the concept of an "indestructible and perpetual union." *White v. Hart*, 80 U.S. (13 Wall.) 646, 650 (1871). Therefore, the framer's must have had a different intent in mind when they used "Posterity."

If "Posterity" is to be viewed as conferring a contingent remainder to a class, then it must fail for being obnoxious to the rule against perpetuities because there would be members of

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[11] Of the 39 signers of the constitution, at least 8 were lawyers (of which one studied at the Middle Temple in London England and another studied law in England), two more appear to have studies law extensively (Chs. C. Pinchkney at the Middle Temple in London, England), and two more were, or became, judges. Generally, Encyclopaedia Britannica (1971) (Comparison with signers Volume 22, p. 695, with their biographies.). Hence it is fair to assume that the framer's were not unaware of what they were doing, and how to secure that which they wished to do.

[12] American Declaration of Independence; Schwartz, The Bill of Rights, A documentary history. The Declaration states, in relevant part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable** Rights, that among these rights, Government are instituted among Men, deriving their just powers from the consent of the governed, ..." American Declaration of Independence, ¶ 2.

the class capable of taking more than 21 years, plus the gestation period, after lives in being. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). But if void, then it would create a fee simple absolute in the present generation, thus, once again, frustrating the intent of the framer's in creating "unalienable rights" and a "perpetual union". Therefore, another meaning consistent with the framer's intent must be found. *Ante*, footnote 5, and the citations therein.

Under the rule in Shelly's Case, a limitation of an estate to an ancestor for life, with the remainder to his heirs or the heirs of his body, gave the whole estate in fee to the ancestor. 31 *Corpus Juris Secundum*, Estates § 4. This rule applies only where the estate in freehold and the estate in remainder are created by the same instrument as in the Preamble. *People v. Emery*, 314 Ill. 220, 145 N.E. 349 (1924); 69 C.J.S. p. 512, note 77. Again, because this is inconsistent with the known intent of the framers, another meaning must be found. *Ante*, footnote 5, and the citations therein.

An estate tail may, under certain circumstances, be created or arise by implication. *Haward v. Howe*, 12 Gray 78 (78 Mass.) 49 (1858); *Kay v. Scates*, 37 Pa. 31 (1860); *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409 (1900); *Gannon v. Albright*, 183 Mo. 238, 81 S.W. 1162 (1904); *Larew v. Larew*, 146 Va. 134, 135 S.E. 819 (1926). Such a situation commonly arises if a conveyance[13] or devise in fee has been made to some particular person named without issue, upon an indefinite failure of issue. In other words, whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder upon an indefinite failure of issue, then the estate first created will be con-

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[13] The Constitution expressly concerns estates and interests in lands. See, Art. I, § 8, cl. 17 (District of Columbia; Places purchased); Art. III, § 3, cl. 2 (forfeitures); Art. IV, § 2, cl. 1 (privileges and immunities), § 3, cl. 2 (property belonging to the United States; Amendment III (Quartering of soldiers); Amend IV (Secure in their persons, houses); Amend V (nor be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation ....).

strued to be an estate tail, or fee tail. 28 American *Jurisprudence*, Second, Estates, § 53. *Cf., Barber v. Pittsburgh, F.W. & C.R. Co.*, 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, affmd 222 U.S. 164 (1911) (recognizing by *dictum* that this rule was followed at common law).

The Statute of De Donis[14] made fee tails unalienable by using the words "to A and the heirs of his body." In 1472, Taltarum's Case virtually abolished tails for most purposes. Y.B. 12 Edw. IV, Mich., fo 14 b, pl, fo 19a, 25. An estate in tail was not subject to The Rule Against Perpetuities because it was a present future interest. See, 13 Edw. I, c. 1; Y.B. 12 Edw. IV, Mich., fo 14 b, pl. 16., fo. 19a, 25. Hence it is reasonable to infer that in lieu of the common law formulation the framers chose "to ourselves and our Posterity" to effectuate their intent that the "first takers should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure". This construction would carry out and effectuate the intent of the framers that the rights conferred be "unalienable", and to create a perpetual union. *Ante*, footnote 5, and the citations therein.

H. Posterity, Including a Fetus, Has Presently Enforceable Rights

There are three points in time when one could cross the threshold of being "our selves" (present interest) from "posterity" (Presently enforceable future interests): conception; at birth; at age of capacity. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ld. Raymd 909 (1703).

Implicit in the Preamble is the concept that the Constitution is to be a social contract. E.g., American Declaration of Independence, ¶ 2; Hobb, Leviathan (1651); Locke, Second Treatise of Government (1690); Laqueur, The Human Rights Reader. It was submitted to the People for ratification. 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177,

[14] 13 Edw. I, c. 1.

193, 196, 209, 565, 582, 590, 651; Amicus Appendix, A7; 3 Rotunda, op cit, p. 663, note 1. Thus it is implicit that acceptance could only be by those not suffering from a disability, i.e., persons with the capacity to consent. R. Edge, "Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy," 1 G.L.Rev. 205 (1967). Viewed as a social contract, the Individual in general promises the individual in particular to secure for him inalienable rights, in return for which the individual promises to conform to the laws of the majority which do not derogate[15] from the promise of inalienable rights. Such mutual promises have always been considered sufficient consideration for enforceability. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ld. Raymd 909 (1703).

As persons who have not reached the age of capacity[16] could not consent, Chitty, op. cit., it would appear that adults are of the class "our selves," and all others of the class "Posterity."

At common law, with few exceptions, the tenant in possession of a fee tail could be enjoined from alienation by those with a right to inherit. Moreover, a *guardian ad litem*, a guardian appointed by a court, could prosecute or defend for an infant in any suit to which he may be a part, 2 Stephens Commentaries 342 (1841), or by the State acting in *Parens patriae*. *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917 (1922), 925; 17 Halsbury's Laws of England (1st ed, 1911), Infants ¶¶ 132, 135. Thus, it is clear that at common law that at least those members of Posterity who were born had a presently enforceable right.

Turning to whether a fetus, as a member of Posterity, had a

[15] Verdross, *Forbidden Treaties Int'l Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens in Int'l Law, 60 AJIL 55 (1966)*;.

[16] The 22nd Amendment provides: "Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. Section 2. The Congress shall have the power to enforce this article by appropriate legislation." Arguably, without this provision, any "person born in the United States or under its jurisdiction" is a citizen, and could vote regardless of age. In practice, age was regulated by the States, and it was understood to be the common law age of maturity, unless modified by the respective states. 3 Rotunda, op. cit., p. 688, Historical Note.

common law protectable interest, it appears in the affirmative. As already noted, *ante* p. 11 citing Lord Coke, while it is was not murder to kill a child in a mother's womb, it was still a misprision (crime)! The unborn was a life in being for purposes of the rule against perpetuities. Gray, op. cit. Moreover, it does not appear that common law barred tort actions for prenatal injuries, *Sinkler v. Kneale*, *supra*, 164 A.2d 93, 94 (1960), which could be brought by a representative. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

It thus appears that in view of the known object and intent of the framers that they intended to create unalienable rights and a perpetual union, knew of the common law rights of the unborn, and chose Posterity without limitation to include within the class of persons protected the unborn conceived fetus.

I. A Fetus is Life Within The Meaning of the 5th Amendment

The Constitution Provides, in relevant part:

> "No person shall be, ... deprived of life ... without due process of law."

U.S. Constitution, 5th Amendment. Neither a State nor the federal government may utilize money to take life without due process of law. *E.g., Flash v. Cohen*, 392 U.S. 83 (1968). Assuming, *arguendo*, that the fetus is a life, it has the right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England, Infants ¶¶ 132, 135 (1st ed, 1911), to be heard on the question as to whether its life should be terminated. *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950); *Furman v. Georgia*, 408 U.S. 238 (1972), and it *progeny*; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

It would appear that a fetus has all of the characteristics of life:[17] excretion,[18] ingestion,[19] respiration,[20] irritation,[21] and reproduction.[22] A zygote (early fetus) is viable, in contradistinction to the ovum and sperm which are not.[23] Whether or not it can be ascertained at any point in time that it is human is an absurd proposition; assuming it goes to term it cannot be anything but human. The fact that the zygote is not viable extrauterine does not negate the fact of life. Life exists in an environment. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut were life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is absurd. Moreover, even a fetus securely within the womb will die if there is an abruption of the placenta.[24] Finally, the courts can judicially notice the advance of science in making possible test tube pregnancies, and transfers from one womb to another, all suggesting the presence of life from conception.

The terms "ensoulment", "psych", "free will", and when they manifest themselves, are not relevant. We are concerned with Posterity, and it cannot be denied, in light of the arguments heretofore made, that Posterity includes all future generations, with the conceived having a presently protectable interest. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

Therefore, the fetus is a life which may not be taken without due process of law, and a compelling, legitimate governmental interest.[25] *Generally, Mullane v. Central Hanover B&T*, 339 U.S.

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[17] Biology: Observation & Concept by Case & Steirs (1971), p. 110.

[18] Id, pp. 122, 141, 143, 149-150;.

[19] Id, pp. 70, 80.

[20] Id, pp. 8, 51, 64, 77.

[21] Id, irritation, pp. 267, 329, 330;.

[22] Id, reproduction, pp. 122, 163-165, 298-299, 327, 329;.

[23] Id, pp. 324-327.

[24] Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979), page 93;.

[25] Because a fetus is a person, the State has an interest in protecting that life, and it therefore becomes a balancing test weighing the interest of the mother against that of the fetus. It would appear then that the life of the fetus could be terminated only if it threatens the life of the mother, because other

706 (1950).

Accordingly, if also follows that no rights of the respondent has been violated because women do not have a constitutional right to an abortion, such right being predicated upon a finding that the termination of a pregnancy is justified, if at all, only for the preservation of the life of the mother.[26]

III

AT COMMON LAW A PERSON HAD, AND STILL HAS, A RIGHT TO USE REASONABLE FORCE IN THE PROTECTION OF HUMAN LIFE, AND ON THE RECORD BEFORE IT THE AMOUNT OF FORCE USED BY PETITIONER CANNOT BE SAID TO HAVE BEEN UNREASONABLE

"Ordinarily, -- if not always," says Bishop, "one may do in another's defense whatever the other might in the circumstances do for himself. Bishop, Criminal Law § 877 (9th Ed., 1923). This special privilege appears to have had its roots in the law of property, but in the course of time outgrew the property analogy and came to be regarded as a "mutual and reciprocal defense." 3 Blackstone's Commentaries 3. In recent years, classifications as to who could defend whom have eroded to become a generalized privilege of using force for the defense of others to include even the defense of strangers. Salmond, Torts 375 (11th Ed 1953.) However, the privilege to use force in defense of another is subject to the same general limitations and restrictions as the privilege to use force in self-defense. Hence deadly force may not be used to save another from non-deadly force, and even non-deadly force must not be obviously in excess of what is needed for the purpose. Id, at Comment b; Boyce & Perkins, Criminal Law and Procedure 819-20 (West, 7th ed 1989).

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alternatives are now available such as transferring the zygote to the womb of a willing carrier or mother.

[26] The strongest argument for abortion is that women should not be forced to die in labor. The retort is that men die for their country in battle when called upon in time of war. The minimal sacrifices women make in insuring that this country has a population to survive pales to insignificance in comparison.

Under International Law, a State has the obligation to provide police protection of its citizens at home. Verdross, *Forbidden Treaties Int'l Law*, 31 AJIL 571 (1937); *Id*, *Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966). The concept to protect a person with due process in American Jurisprudence is derived from the *Magna Carta* (1215).[27] *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). The 5th Amendment prohibits the taking of life without due process of law, and it is enforced and made binding against the states by the 14th Amendment. *Generally, Furman v. Georgia*, 408 U.S. 238 (1972), and it *progeny*; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

Given a state's obligation to protect it citizens at home, and to ensure life is not taken without due process of law, neither Washington nor Virginia has any legitimate interest in denying to its citizens the right to defend and protect fetal life. Their citizens, and the citizen's of every state, have an interest in insuring that there exists safeguards to insure that abortion does not become a tool for genocide. E.g., International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984; U.S. Const., Art. VI, cl 2 (treaties).[28]

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[27] McKechnie, *Magna Carta*; the Great Charter of King John. McKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw 1 (*Magna Carta*)(1297), p. 14, Notes, ¶ 2.

[28] This is not to say that a State may say a woman does not have any right to privacy and may never have an abortion. Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d (Quartering of soldiers), and 4th (search and seizure) Amendments; *Katz v. United States*, 389 U.S. 347 (1967), and its *progeny*. But it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes to do with their body if the conduct amounts, under state law, to a crime. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Nonetheless, every person has the right to self defense. Foster, Crown Law 273-277 (1762); Restatement (2nd) Torts §§ 63, 64, & 65; *Brown v. United States*, 256 U.S. 335 (1921). Thus it would appear where the woman's life or health is endangered, termination of the pregnancy would be justified. But even here, there appears to be less drastic alternative means than outright abortion. This court can judicially notice, or remand for consideration, the fact that modern advances have made possible womb to womb transfers to embryos. On the same basis, this court may notice or remand the fact that there are many persons unable to conceive who would welcome such transfers.

Based on the foregoing considerations, and in light of the record below, Women do not have a fundamental right to abortion, and therefore no rights of Respondent have been violated. On the contrary, the life of a fetus being a constitutional person is entitled to protection, and on the record below, it cannot be said that the conduct of the Petitioners was unreasonable.

CONCLUSION

Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, reverse the decision of the Fourth Circuit at 914 F.2d 583 as to the rights of women to have abortions, and remand for further proceedings not inconsistent with this Court's opinion.

Dated: April 7, 1991

Respectfully submitted,

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EXCERPTS FROM
2 Farrand, Max, The Constitutional Debates*

[129]

COMMITTEE OF DETAIL, I

***

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

*****

---

* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

[163]

COMMITTEE OF DETAIL, IX

*****

IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

****

[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

Tuesday August 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

*****

[196]

Tuesday MADISON August 7

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up ...

******

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

[209]

Tuesday | MADISON | August 7

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

*****

[565]

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

[590]

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]

THURSDAY, SEPTEMBER 13, 1787.

JOURNAL

Thursday September 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification. ***

*****

[604]

***

[To postpoine the report respecting the 22nd and 23rd Ayes -- - 9; noes — 1.]

*****

To strike out the word "to" before establish justice Ayes --

- 8; bites — 2.]

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President.	
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Doct. Franklin rose with a speech in hand ....

*****

[643]

... — He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

*****

[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

*****

[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

Supreme Court, U.S.
FILED
APR 11 1991
OFFICE OF THE CLERK

No. 90-985

In The

Supreme Court of the United States

October Term, 1990

JAYNE BRAY, et al.,

Petitioners,

-v.-

ALEXANDRIA WOMEN'S HEALTH CLINIC, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF FREE CONGRESS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

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No. 90-985

In The

Supreme Court of the United States

October Term, 1990

JAYNE BRAY, et al.,

Petitioners,

-v.-

ALEXANDRIA WOMEN'S HEALTH CLINIC, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF FREE CONGRESS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS*

For more than a decade, amicus Free Congress Research and Education Foundation, a non-profit foundation, has actively sought to advance fundamental principles of judicial restraint and the rule of law. Among these

* The parties to the present case have consented to the filing of this brief. A letter granting consent has been filed with the Court by Petitioners and the letter of Respondents is being submitted herewith.

principles is the consistent application of traditional rules of statutory construction and constitutional interpretation. The proper role for the courts is settlement of legal disputes by faithful application of the law to the facts of particular cases. Only then can social policy develop as it should, unaffected by far-reaching and injudicious decisions by courts more affected by politics than law. Amicus believes this case presents this Court with such an opportunity to insist on traditional canons of interpretation.

SUMMARY OF ARGUMENT

Respondents allege their membership in the protected class of "women seeking abortions," but fail to demonstrate that Petitioners acted "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 829 (1983). This Court has construed the statutory phrase "class of persons" to require a showing of "some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). "Women seeking abortions" is not, under 42 U.S.C. Section 1985(3), a protected class defined by any invidious class-based animus. Thus Petitioners have not acted with an invidious class-based animus even if their acts impacted on Respondents, who place themselves in the class of "women seeking abortions."

Even assuming arguendo that "women seeking abortions" constitutes a gender classification, the United States Constitution creates no substantive right to be free of purely private gender classifications. This Court has held that:

> Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.

Great Am. Federal S. & L. Ass'n v. Novotny, 442 U.S. 366, 372 (1979). Respondents fail to state a claim under Section 1985(3) because freedom from private gender classification is not among the substantive rights designated by Section 1985(3).

In *Griffin*, 403 U.S. at 102 n. 9 (citation omitted), this Court left for another day the question "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under . . . Section 1985(3) . . . " However, this Court need not resolve this question today. Even if the United States Constitution were now construed to create a substantive right to be free from private gender classifications, and even if an invidious sex classification would qualify for consideration as a protected "class of persons" under Section 1985(3), gender classifications are not per se invidious.

This Court tests the invidiousness of a gender classification system by determining whether the system relies on the use of "archaic and stereotypic notions." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982). Respondents' class, defined as "women seeking abortions," fails this Court's test. The class alleged by

Respondents realistically reflects the physical (and legal) differences between the sexes, in that only women can get pregnant and only women can exercise a right to seek abortions. Men can do neither.

ARGUMENT

THIS COURT MUST REVERSE THE JUDGMENT OF THE FOURTH CIRCUIT BECAUSE "WOMEN SEEKING ABORTIONS" IS NOT A PROTECTED CLASS UNDER 42 U.S.C. SECTION 1985(3)

A. Section 1985(3) provides a remedy only for a deprivation, due to an invidious classification, of substantive rights created in the United States Constitution.

This Court has held "Section 1985(3) provides no substantive rights itself . . . " *Great Am. Federal S. & L. Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). Even where the substantive right being vindicated by a Section 1985(3) action does not separately require "a group animus," Section 1985(3) imposes that requirement. *Id.*, 442 U.S. at 378.

In contrast to the statutory requirement of a class-based animus, this Court also correctly has held that where the underlying substantive right does not require state action, Section 1985(3) does not superimpose a requirement of state action. However, where the substantive right is only to be free from state action in violation of the right, Section 1985(3) protects only against state action resulting in a deprivation. *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833-34 (1983). Since Section 1985(3) provides no substantive rights, "the

rights, privileges, and immunities that Section 1985(3) vindicates must be found elsewhere . . . " *Id.*, 463 U.S. at 833-34. If the right must be protected against class-animus, a source of that right must be identified. The "rights, privileges, and immunities" to be free from private gender discrimination is nowhere to be found.

While vindication of the right of interstate travel by means other than by private gender discrimination may not depend on proof of an invidious class-based animus, a Section 1985(3) claim for deprivation of that substantive right still requires such a showing. *Novotny*, 442 U.S. at 388, n.5 (White, J., Brennan, J., and Marshall, J., dissenting). Without question, although the Constitution prohibits state action which injures First Amendment rights, there is no parallel right in the Constitution to be free from private gender discrimination.

Respondents cannot invoke Section 1985(3). "[U]nlike the Thirteenth [Amendment which] affords the plaintiff [ ] protection against discrimination in which there is no state involvement of any kind," *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (opinion of Stevens, Circuit Judge), a private conspiracy based on a gender classification does not abridge the Constitution.

B. "Women seeking abortions" is not a gender classification.

"Women seeking abortions" is not a gender classification.[1]

---

[1] *In contrast see, Califano v. Westcott*, 443 U.S. 76, 83 (1979) (gender distinction conceded).

Women and men are petitioners. Women and men are respondents. Women and men support a woman's right to choose to terminate a pregnancy. Women and men oppose a woman's right to choose to terminate a pregnancy. Women and men perform abortions and provide abortion support services. The fetuses Petitioners seek to protect and save are women and men. Neither law nor logic supports Respondents' view that animus against the performance and legalization of abortion reflects a gender-based classification.

Treating "women seeking abortions" as a class is not a gender qua gender classification. Any other conclusion is untenable. Treating Respondents' class, "women seeking abortions," as gender-based discrimination eliminates the required nexus between the objective fact (plaintiff's membership in a protected class) and the subjective fact (defendant's invidiously discriminatory animus based upon plaintiff's membership in that class). Absent that nexus of protected class and prohibited animus, members of a racial minority always satisfy the protected class requirement but only by the accident of being born into one or another of various racial groupings regardless of the relevance of race to a defendant's animus. Respondents' claim fails because although they coincidentally may be women, their gender has no nexus with the alleged motivation of petitioners. In fact, abortion facility doctors and personnel, not their abortion-bound patients, are the primary focus of Petitioners' alleged conspiracy. Therefore, the Court need not resolve whether Section 1985(3) encompasses gender classification because no gender class is properly alleged.

C. Assuming arguendo "women seeking abortions" is a gender classification, Section 1985(3) does not protect any substantive right to be free from private gender classification.

Section 1985(3) prohibits conspiracies born of prohibited class-based animi which deprive class members of substantive rights found in the United States Constitution. The Constitution must provide a source of power to reach a private class-based animus for the section to be applied. Assuming arguendo the Constitution prohibits private gender classifications, as well as private racial classifications, it does so only as to a right to be free from gender classifications impairing the right to vote. There is no substantive constitutional right to be free from gender classifications which impact on the right of interstate travel. The trial court thus lacked subject matter jurisdiction to reach the federal questions presented by the complaint in this case.

1. Congressional Power.

This Court found constitutional power for Congress to reach the *Griffin* conspiracy in the Thirteenth Amendment. *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971). However, there is no "source of congressional power to reach the private conspiracy alleged by the complaint in this case." *Id.*, 403 U.S. at 105-06. The trial court lacked subject matter jurisdiction to reach a conspiracy fomented by alleged gender animus.

Congress can reach private racial discrimination because the Thirteenth Amendment proscribes private

conduct. The Constitution is devoid of an analogous provision empowering Congress to proscribe gender discrimination. While the Constitution protects the right to "pass freely from state to state" against private interference, there is no coordinate constitutional prohibition of private gender classification. *Id.*, 403 U.S. at 105-06.

Respondents cannot identify any substantive right to be free from private gender classification because "the Constitution [does not] create any right to be free of gender-based discrimination perpetuated solely through private action." *Novotny*, 442 U.S. at 381 (Powell, J., concurring). *See also, id.*, 442 U.S. at 385 (Stevens, J., concurring) ("Private discrimination on the basis of sex is not prohibited by the Constitution"); *See also, id.*, 442 U.S. at 388 n.5 (White, J., Brennan, J., and Marshall, J., dissenting) (declining to reach the issue of whether "sex discrimination by private parties . . . proceed[s] from explicit constitutional guarantees" in a case where a statutory right to be free of gender classification was presented on the facts).

This Court has never found in the Constitution a source of congressional power to reach private gender classifications. Indeed, this Court expressly overturned the decision of the Third Circuit which found such a power under the Commerce Clause, U.S. Const. art. I, § 8, in the enactment of Title VII, 42 U.S.C. § 2000e *et seq.* (1970).[2] *Novotny v. Great Am. Federal S. & L. Ass'n*, 584 F.2d 1235 (3rd Cir. 1978), *rev'd, Great Am. Federal S. & L. Ass'n v. Novotny*, 442 U.S. 366 (1979). Relying on an

[2] *See, infra.*, n. 11.

express federal statutory substantive right, *Novotny* attempted only to reach gender classifications in the realm of employment, not interstate travel. Public classifications based on gender are subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Respondents' claim fails, however, because the Constitution affords no substantive right to be free from *private* gender classifications.

In *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981), the Fourth Circuit recognized the need to identify a source of congressional power because the plaintiff was "not a member of the Negro race." The *Ward* Court recognized that the *Griffin* Court found congressional power in the Thirteenth Amendment (despite the nature of Griffin's substantive claim being the right to interstate travel). Without explanation, however, the Fourth Circuit relied directly on the right to travel for a source of congressional power for the use of Section 1985(3) in the case of religious animus. The *Ward* rationale does not support the extension of Section 1985(3) to prohibit private gender classifications because *Ward* did something this Court has refused to do.[3]

[3] *United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989), is inapposite because it dealt with a criminal provision to enforce statutory rights prohibiting classifications based upon race, color, religion, or national origin – not gender. And, in contrast, Section 1985(3) enforces no substantive constitutional (or statutory) right to be free from gender-classification in the right to travel. The criminal provision was upheld based upon the Commerce Clause because "Congress intended to invoke that power." In amending and re-enacting that section several times through 1966, Congress made findings on the impact of the

(Continued on following page)

2. Statutory Construction.

Even if Congress had the power to reach private gender classifications, they made no attempt to do so because neither this Court nor that Congress considered private gender classifications to be invidious when Section 1985(3) was passed.[4]

a. Gender Classifications Are Not Always Invidious.

The Fourth Circuit below, holding that private gender classifications are inherently invidious, relied on its earlier decision in *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985). *Buschi*, while deciding that whistleblowers are not a protected class, expressly refused to adopt either an "expansive view" of Section 1985(3) or the *Scott* majority's view. It begs the question to define a "protected" class as a class which otherwise would be "unprotected."

(1) The Minority View.

"Women' seeking abortions" are not a class "in unprotected circumstances." *Scott*, 463 U.S. at 851 (Blackmun, J., Brennan, J., Marshall, J., and O'Connor, J.,

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(Continued from previous page)

section on interstate commerce. On the other hand, Section 1985(3) has remained unchanged since 1871, at a time when Congress had not the slightest reason to consider the impact of gender classification on interstate commerce or to rely on the Commerce Clause.

[4] 118 CONG. REC. 8899, 8901 (1972) ("the Court has upheld many laws which plainly discriminate against women").

dissenting). "Women seeking abortions" are not vulnerable to "the possibility of ineffective state enforcement . . . " *Id.* The well-documented and effective efforts of state legislative, judicial and police protection of the exercise by women of the right to seek abortions, *see generally* Brief of Concerned Women of America as Amicus Curiae in Support of Petitioner, belies the protected status of that "class" as persons "whose beliefs or associations placed them in danger of not receiving equal protections of the laws from local authorities." *Id.*, 463 U.S. at 853. Furthermore, women compose more than fifty percent of the electorate. Therefore, "women seeking abortions" is not a protected class because even under the "expansive view" they are not "unprotected."

(2) The Majority View.

The Fourth Circuit incorrectly viewed the *Scott* majority opinion as automatically extending the coverage of Section 1985(3) to all classes with "characteristics comparable to those characterizing classes such as race, national origin, and sex." *Buschi*, 775 F.2d at 1258.

This Court refused to affirm a view that Section 1985(3) "reache[d] conspiracies other than those motivated by racial bias . . . " *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 835 (1983). The Fourth Circuit's restatement of the narrow view simply is untenable in light of this Court's holding that the "close question" is whether the Section was intended to reach anything other than racial animus:

> it is a close question whether Section 1985(3) was intended to reach any class-based animus

> other than animus against Negroes and those who championed their cause . . .

Scott, 463 U.S. at 836. Appropriate construction of the statute and the Constitution compels the conclusion that Section 1985(3) does not reach gender classifications.

Gender classifications, not considered invidious when Section 1985(3) became law, cannot be placed within the scope of Section 1985(3) retroactively by hindsight interpretations.[5] Since the enactment of Section 1985(3), the Constitution has been amended to permit Congress to reach only those private gender classifications impairing the right to vote.

b. The Nineteenth Amendment.

Congress debated and approved Section 1985(3) in 1871. Ratification of the Nineteenth Amendment to the United States Constitution occurred on or about August 18, 1920:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. Amend. XIX.

The amendment does not confer on women the right to vote. It merely prohibits gender discrimination in that right. *State v. Mittle*, 120 S.C. 526, *error dismissed*, 260 U.S.

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[5] *See for example, N.Y. State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1359 (2nd Cir. 1989).

705 (1922). *See also United States v. Reese*, 92 U.S. (2 Otto) 214 (1876) (Fifteenth Amendment does not confer the right of suffrage on blacks, only forbids discrimination in the exercise of that right).

Before the passage of the Nineteenth Amendment public and private gender classification in the exercise of the fundamental right to vote was permitted. After its passage, gender classification was prohibited only in the exercise of the right to vote. A fortiori, the Constitution provides no substantive right to be free of gender classification in the exercise of the right to travel, just as before the passage of the Reconstruction Amendments the Constitution provided no substantive right to be free of racial classification in the exercise of that right.

At the time Congress enacted Section 1985(3), gender-based classifications were not considered invidious, and such classifications would not be so considered for another fifty years. Congress did not intend the section to apply to gender classifications. Because no applicable constitutional substantive right existed at the time of Section 1985(3)'s enactment, Congress could not have intended the section to apply to gender classifications. If the statute when and as written did not apply to gender classifications, the court below lacked jurisdiction to entertain its application herein. That a subsequent Congress determined gender classifications are sometimes invidious is inapposite to determining the scope of Section 1985(3).

c. The Equal Rights Amendment

The proposed Equal Rights Amendment, which would have banned invidious public gender classifications, was passed by both houses of the Congress in or around 1972, a century after the debate on the intended scope of Section 1985(3). It provided in pertinent part:

> Sec. 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

H.R.J. Res. No. 208, 92d Cong., 2d Sess. (1972).

It was clear to opponents and proponents of the amendment that it would not apply to private conduct.

Both houses of Congress recognized that H.J.Res. 208 was not an attempt to create a substantive constitutional right to be free from private gender classifications.[6] The

[6] 116 Cong. Rec. 28004, 28005 (1970)("would not apply to purely private action"); 118 Cong. Rec. 8889, 8901 (1972) ("Much of this discrimination is directly attributable to governmental action"); 118 Cong. Rec. 8889, 8902 (1972) ("The amendment affects only governmental action; it does not affect the private action or the social relationships between men and women . . . would apply only to governmental action, and not to private or individual action"); 118 Cong. Rec. 9544, 9583 (1972) ("Private discrimination [requires a] find[ing of] state action"); 118 Cong. Rec. 9544, 9597 (1972) (sex classification requires a showing of "governmental action perpetuating sex discrimination").

record of the debate on the proposed Equal Rights Amendment unequivocally supports the conclusion that private gender classifications are not prohibited by the Constitution. Rather the debate record leads to the conclusion that Section 1985(3) does not, and was not intended to, reach private gender classifications.

Similarly the congressional debate on the proposed Equal Rights Amendment made clear that the amendment would not prohibit distinctions "based on some fair or reasonable classification, [where] all persons embraced within the classification are treated alike."[7] 118 Cong. Rec. 8899, 9083 (1972). Without doubt the debate on the proposed Equal Rights Amendment bolsters the conclusions that when enacted Section 1985(3) had not been intended to include private gender within its ambit and that gender classifications were not to be considered per se invidious.

Many states have adopted amendments to their constitutions with similar or identical language to the federal proposed Equal Rights Amendment. Where courts have

[7] *See also, id.*, at 8902 ("would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example [a classification regarding] child bearing could only apply to women"); 8904 (amendment would not invalidate classifications where women "are uniformly distinct from men", or "on the basis of ability or other relevant characteristics"). The Senate recognized that the Constitution "gives just one clearly-stated constitutional right to women [and] fails to extend to the female half of our population . . . equal protection of the laws." *Id.*, at 8905. It was further perceived that this Court had not held "that sex discrimination is 'suspect'." *Id.*

interpreted those amendments, the amendments have not been found to apply to private conduct,[8] or to ban a gender classification "that depends for its application upon a physical characteristic that is unique to one sex." *Holdman v. Olim*, 581 P.2d 1164 (Hawaii 1978). *See also, People v. Salinas*, 191 Colo. 171 (1976)("in such a case, the sexes are not similarly situated and thus equal treatment is not required").

"The constitution does not require things which are different in fact or opinion to be treated by the law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The ability to become pregnant, and the concomitant right to terminate that pregnancy, certainly is unique to women. The failed efforts to ratify the Equal Rights Amendment do not suggest otherwise.

Even if the United States had eventually ratified the proposed Equal Rights Amendment, in contrast to the conclusion of the Third Circuit in *Novotny, supra*, neither it nor any substantive provision of the United States Constitution would reach private gender classification.

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[8] *See Lincoln v. Mid-Cities Pee Wee Football Ass'n*, 576 S.W.2d 922 (Tex. Civ. App. 1979); 16C C.J.S. CONST. LAW §§ 942-43 (1985). *See also* 16A Am. Jur.2d CONST. LAW §§ 574-78 (1979); *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. CIVIL RIGHTS-CIVIL LIBERTIES LAW REV. 215, 231 (1971) (not applicable to "private, non-governmental" conduct).

D. Assuming arguendo the United States Constitution provides a substantive right to be free from some private gender classifications, "women seeking abortions" is not an invidious classification because private gender classifications are not inherently invidious.

This Court has found that the word "equal" in "equal protection of the law or [ ] equal privileges and immunities under the laws", in Section 1985(3), requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus . . . " *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Even assuming arguendo that some gender-based classifications are invidious, the Constitution provides no substantive right to be free from private gender classification other than in the right to vote. Assuming further that the class of "women seeking abortions" is a gender classification, Respondents complaint is still inadequate because "women seeking abortions" is not an invidious gender classification.

1. Application of the Test of the Invidiousness of a Gender Classification.

This Court frequently has confron[illegible]nder classifications, finding some invidious but not [illegible]ers. Application of this Court's stringent but "straightforward" "test for determining the validity of a gender-based classification . . . " leads to the inescapable conclusion that "women seeking abortions" is not an invidious gender classification.[9] *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

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[9] The equal protection jurisprudence of this Court examines whether or not classifications based upon sex are

(Continued on following page)

This Court should apply the following test to determine which gender-based classifications are invidious and which are not: whether the classification employs "archaic and stereotypic notions" with the result that similarly situated persons are treated differently only because of such notions.[10] *Id.*, at 725.

This Court's recent treatment of the invidiousness of gender classifications begins with the case of *Reed v. Reed*, 404 U.S. 71 (1971). *Califano v. Goldfarb*, 430 U.S. 199, 229 (1977) (Rehnquist, J., Burger, C.J., Stewart, J., and Blackmun, J., dissenting). Subsequently many members of this Court have recognized that:

> Men and women are different [in that] [o]nly the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not.
>
> . . . .
>
> If we assume, as we surely must, that characteristics possessed by all members of one class and by no members of the other class justify some disparate treatment . . . the mere fact that

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(Continued from previous page)

invidious, and therefore provides relevant case authority for testing gender classifications.

[10] The line between invidious and non-invidious gender classifications has been alternately characterized by this Court as "archaic and overbroad," "loose-fitting characterizations . . . premised upon their accuracy," and as a "weak congruence between gender and the characteristic or trait that gender purported to represent." *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (citations omitted).

> the [classification] draws a "gender based distinction," [ ] should not [ ] give rise to any presumption . . .

Caban v. Mohammed, 441 U.S. 380, 404-10 (1979) (Stevens, J., Burger, C.J., Rehnquist, J., dissenting), *citing*, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67-75 (1976). Respondents simply fail to identify any "sexual stereotypes" of Petitioners because there are none. *Califano v. Westcott*, 443 U.S. 76, 89 (1979).

Indeed, "[G]ender-based classifications are not invariably invalid. When men and women are not in fact similarly situated . . . [such as classifications that] reflect the physical reality that only the mother carries and gives birth to the child [the classification is not invalid.]" *Caban*, 441 U.S. at 398-99 (Stewart, J., dissenting) (citations omitted).

Pregnant women are in a "different class[ ] of persons" from women who are not pregnant. *Reed v. Reed*, 404 U.S. 71, 75 (1971). They may be treated "in different ways" both from pregnant women who are not seeking abortions and women who are not pregnant. *Id.*, 404 U.S. at 75. It is irrational to characterize a classification which recognizes that only women can get pregnant and only women can have a pregnancy terminated by abortion as an "archaic and overbroad" generalization based solely on sex. *Goldfarb*, 430 U.S. at 207, 211-12. Classifying a woman on this basis does not imply that she is inferior. *Id.*, 430 U.S. at 218 (Stevens, J., concurring). Nor does it perpetuate any "discrimination." *Id.*, 430 U.S. at 242 (Rehnquist, J., Burger, C.J., Stewart J., and Blackmun, J., dissenting). The recognition that women can get pregnant is not a " 'role-typing society has long imposed' upon

women;" rather, it is a role nature has "imposed" upon women. *Califano v. Webster*, 430 U.S. 313, 317 (1977) (quoting, *Stanton v. Stanton*, 421 U.S. 7, 15 (1975)). Furthermore, no classification by petitioners has the capacity to confer any benefits or impose any burdens upon respondents. *Orr v. Orr*, 440 U.S. 268, 291-92 (1979) (Rehnquist, J., Burger, C.J., dissenting).

A gender classification is "not invidious, [where it] rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 469 (1981). The archetypal realistic difference between men and women is that "females can become pregnant . . . males cannot." *Id.*, 450 U.S. 478 (Stewart J., concurring); *id.*, 450 U.S. at 498 (Stevens, J., dissenting) ("the capacity to become pregnant is what primarily differentiates the female from the male"). Classifications which realistically reflect the differences between the sexes are not invidious because they are not:

> overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.

Id., 450 U.S. at 469.

The dissenting opinion in *Michael M.* is not to the contrary. *Id.*, 450 U.S. at 489 n.2 (Brennan, J., White, J., Marshall, J.). *Michael M.* dealt with a "statutory rape" law with disproportionate impact upon gender lines. The dissent recognized the "uncontested fact that only females can become pregnant" but concluded the government failed to carry its burden to show a gender-neutral classification would be less effective. In contrast, because only

women have the legal right to choose abortion, no gender-neutral classification could serve the purpose of Petitioners – to save unborn girls and boys – as effectively.

2. Those Circuits Which Conclude That Gender Classifications Are Inherently Invidious Directly Contradict This Court's Jurisprudence.

In *Novotny*, the Third Circuit misconstrued a decision of this Court in *Frontiero, infra*, in announcing the proposition that gender classifications are always invidious.[11] *Novotny v. Great Am. Federal Sav. & L. Ass'n*, 584 F.2d 1235, 1243 (3rd Cir. 1978), *rev'd on other grounds, Great Am. Federal S. & L. Ass'n v. Novotny*, 442 U.S. 366 (1979). As a result, and because no difference between the sexes was presented on the facts of that case, the Third Circuit did not account for the physical difference (that women can become pregnant) and the legal difference (that women have the right to seek abortions) between the sexes.[12] When this Court takes account of those differences, physical and legal, it cannot avoid a finding that "women seeking abortions" is not an invidious classification. This result obtains under both the majority and minority views of the Court. *Supra* Argument C(2)(a).

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[11] The gender classification in *Novotny* – based on archaic notions of the ability of women to do certain jobs as well as a man – was an invidious classification. Nonetheless, Section 1985(3) did not confer jurisdiction over that invidious private gender-based classification because there is no umbrella constitutional right to be free from private gender-based classification.

[12] *See, infra.*, n. 14.

The Fourth Circuit in the present case shared the error of the Third Circuit in *Novotny* – both courts failed to recognize the relevant issue. Neither this Court nor the lower courts need now decide whether private gender classifications are ever invidious, or always so. Rather, the appropriate issue to be determined on this Petition is whether this particular private gender classification – "women seeking abortions" – is invidious. *Novotny*, 442 U.S. at 390 n.6 (White, J., Brennan, J., and Marshall, J., dissenting) (sex classifications "may" be sufficiently invidious to come within Section 1985(3)). This Court also need not decide whether Section 1985(3) regulates invidious private gender classifications because "women seeking abortions" is not an invidious classification.

The Second Circuit also misconstrued *Frontiero* for the proposition that gender classifications are per se invidious. *N.Y. State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1359 (2nd Cir. 1989). Therefore, that court never addressed the issue of which bases of gender classification are invidious and which are not. Neither the summary finding in *Novotny* nor *Terry* provide any rationale to support the conclusion that gender classifications are inevitably invidious. Even if the Second, Third and Fourth Circuits have correctly read *Frontiero*, that case no longer sets the standard for gender-based classification.

3. This Court Has Expressly And Practically Rejected A Per Se Approach To Gender Classifications.

In *Frontiero v. Richardson*, 411 U.S. 677 (1973), this Court held that sex classifications were inherently

suspect. The Court rejected "dissimilar treatment for men and women who are . . . similarly situated" which results from stereotyped distinctions. *Id.*, 411 U.S. at 688 (quoting *Reed*, 404 U.S. at 77). The Court reasoned that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . and . . . frequently bears no relation to ability to perform or contribute to society." *Id.*, 411 U.S. at 686. The Court also noted that by passage of the Equal Rights Amendment and statutes prohibiting sex discrimination that Congress has concluded "classifications based upon sex are inherently invidious . . . "[13] *Id.*, 411 U.S. at 687-88.

The Court quickly "signal[ed] a retreat" from the *Frontiero* view that sex is a "suspect" classification. *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting). Although the Court continued to reject gender classifications where they are an "inaccurate proxy for other, more germane bases of classification," it has neither treated nor purported to treat gender classifications as uniformly invidious. *Id.*, 429 U.S. at 198. The trait purportedly represented by Respondents' class, that a woman can get pregnant and seek to terminate her pregnancy, is the one this Court has repeatedly recognized "actually comport[s] with fact." *Id.*, 429 U.S. at 199. The distinction obviously reflects a "physical difference between males

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[13] None of these congressional realizations had occurred when Section 1985(3) was enacted, and *Frontiero* accordingly never determined the applicability of Section 1985(3) to private gender classifications. *See, supra*, Section C.2.

and females . . . "[14] *Id.*, 429 U.S. at 212 (Stevens, J., concurring). The very description of the gender classification reflects the physical difference and therefore defeats the assertion that it is an invidious classification.

Even if *Frontiero* still applied to gender classifications, it would not convert "women seeking abortions" into an invidious classification because "the sex of the individuals involved" is not the "sole basis of the classification."[15] *Id.*, 411 U.S. at 688. The other bases besides sex are (1) that women can get pregnant, and (2) that women can exercise the legal right to seek an abortion. Any women receiving dissimilar treatment do not comprise a protected class because they are not women who are in "unprotected circumstances" or who are "similarly situated." *Id.*, 411 U.S. at 690. This Court need look no further than the words Respondents use to define their class to know that the alleged classification reflects real physical and legal differences between men and women and therefore is not invidious. Thus Respondents' claim fails.

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[14] It also reflects a legal distinction in that it is " 'a woman's decision whether or not to terminate her pregnancy.' " *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 60 (1976) (quoting *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

[15] *See, supra*, Section B.

CONCLUSION

For all the foregoing reasons, the judgment of the Fourth Circuit must be reversed and Petitioners must be declared prevailing parties.

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No. 90-985

In The
Supreme Court of the United States
October Term, 1990

JANE BRAY, *et. al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et. al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF AMICUS CURIAE OF GEORGE LUCAS, THE NATIONAL BLACK COALITION FOR TRADITIONAL VALUES, AND OTHER BLACK LEADERS AND ORGANIZATIONS IN SUPPORT OF PETITIONERS

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Note: This Amici Brief is being filed with the consent of all of the parties. Consents are on file with the Office of the Clerk.

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INTEREST OF THE AMICI

The amici are certain black pastors and organizations who are concerned that federal civil rights statutes, which were enacted principally to protect all Americans against racial bias, will lose their still-needed focus on racial animosity.

The amici are also concerned about the attempt of certain elements in society to use abortion as a genocidal tool for getting rid of America's socially despised poor.

George Lucas and the
National Black Coalition for Traditional Values
Petersburg, Virginia

Rev. Hiram Crawford and the
Pro-Life Pro-Family Coalition
Chicago, Illinois

Dr. Dolores Bernadette Grier and the
Voters Against Abortion
New York, New York

Pastor Joe Dallas and the
Blacks for Life
Milwaukee, Wisconsin

Rev. Cleveland Sparrow and the
Sparrow World Baptist Church
Washington, D.C.

Barbara Bell and the
Massachusetts Blacks for Life
Medford, Massachusetts

Rev. St. George Cross and the
Society for the Advancement of Families Everywhere
Randalls Town, Maryland

Pastor Greg Keith and the
Black Alliance for the Family
New Brighton, Minnesota

SUMMARY OF ARGUMENTS

The focus of the Ku Klux Klan Act on protecting racial minorities against discrimination should not become blurred through the adoption of different standards or tests for determining how a protected class should be defined.

The Ku Klux Klan Act, which was designed to protect us against racial animosity, should not be turned inside out to become a tool of those who wish to rid society of its unwanted black population.

There is no fundamental right to kill a human offspring, prenatally or otherwise. Thus there is no right in this case protected by the Equal Protection provisions of the Ku Klux Klan Act or of the Fourteenth Amendment. Thus, there is no federal jurisdiction to hear this case.

The reason there is no such fundamental right is that this Court's holding in *Roe v. Wade* was in error. In *Roe v. Wade*, this Court resurrected its analysis found in its infamous *Dred Scott* decision by declaring that prenatal human offspring, like *Dred Scott* before them, are not persons under the eyes of the law. Black babies have borne the brunt of this dehumanizing analysis, and this will become even more the case as time goes on. *Roe v. Wade*, and the analysis of *Dred Scott* with it, must be overruled.

ARGUMENTS

I. THE TESTS FOR DEFINING A CLASS WITHIN THE MEANING OF THE CIVIL RIGHTS STATUTES SHOULD NOT BE TAMPERED WITH OR ALTERED.

Traditionally, it has been possible to show that one falls within the protective scope of federal civil rights laws simply

by showing that one is black. This protected us against both obvious and subtle acts of racial hatred. This is what Congress intended. But if the definition of a class within the meaning of these statutes is changed, the focus of these statutes on racial harassment can become blurred, the full measure of the law's protection against racial discrimination diluted.

If blacks who find that they are the victims of subtle forms of discrimination must begin meeting new standards for defining a class, the fact that they are black might no longer suffice for them to claim their right to protection under the civil rights laws.

We have no objection to sharing with other classes of persons the enjoyment of other federal laws for the protection of civil rights. We only ask for the full enjoyment of our own civil rights laws. Congress is fully competent to pass other civil rights laws which can embrace other classes of persons and use other standards and tests for determining the existence of a suspect class.

We share the hopes and aspirations of all those who strive for equality. We simply don't want the hard-fought gains of the past, paid for in full measure in blood, to be eroded now under the dangerous myth that strong measures for the protection of racial minorities are no longer needed.

II. ABORTION IS A TOOL OF RACIAL GENOCIDE.

Talk about class animus! If ever there was class animus it has been the attempt by certain elements of society to keep blacks in a socially, economically, and politically inferior position in society.

Margaret Sanger, the founder of Planned Parenthood, sought a solution for society's Negro problem. She started a

"Negro project" designed to reduce the black population in America. Black Americans were particularly targeted because to Margaret Sanger, the way to get rid of poverty was to get rid of poor people. She despised poor people as being a drag on society, and said that the desire of black families to have children was based on "...their ignorance, superstitions and doubts." *Letter of Margaret Sanger to C. Gamble,* December 10, 1939.[1] She sadly noted that "large numbers" of blacks "still believe...that God sends them children." *Letter of Margaret Sanger to D. Rose,* March 8, 1941. To her, the next generation of black babies was nearly a disease. In this context she wrote:

"We do not want word to go out that we want to exterminate the Negro population and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members." *Letter of Margaret Sanger to C. Gamble*, December 10, 1939.

One of her associates referred to "the colored minister" as being "an extremely necessary unit in the work." *Letter of Margaret Sanger,* December 2, 1939. Another associate proposed that "minor contributions to local (black) churches" be made in order to win their support. *Letter of C. Gamble to Florence Rose*, November 26, 1939. But noting that blacks might recognize it as a plan for extermination, this same associate wrote,

"Hence let's appear to let the colored run it (the Colored Steering Committee) as we appeared to let the South do the conference in Atlanta." *Id.*

1.) The references herein to the letters of Margaret Sanger are from the Margaret Sanger Papers which are kept on file in the Women's History Archives at Smith College in Northampton, Massachusetts. We wish to thank the African-Americans Against Black Genocide for providing us with a copy of them.

Well, we are black ministers and black leaders, but we are not fooled by those who say they are doing us a favor by aborting our children. Black America is not one of society's problems. Black babies are not some sort of disease that should be wiped out so that society itself will not have to confront the root causes of poverty.

Black babies are black America's future. Black babies are America's future just as much as white babies are.

More black babies have been killed through abortion since *Roe v. Wade* was decided, however, than were freed by the Civil War and the Thirteenth Amendment.

In this case the number one proponent of abortion has now come forward to use the Ku Klux Klan Act to advance its own agenda. It is an abomination to hear of any such group trying to use a law which was designed to protect us against racial harassment in order to carry on a practice which devastates the black community and promotes the genocidal policies of Planned Parenthood's founder, Margaret Sanger.

The program of Planned Parenthood is the Civil Rights Movement in reverse. Dr. King looked at the despair and depression in the black community and wondered how it could be changed by building the black community up from the inside, by providing black Americans with the opportunities they would need to strengthen themselves and their families. His dream was based upon a belief that black America could, despite its lowly status, rise up from where it was and assume its rightful place in society, its full rightful share of opportunity, and its full realization of the American dream.

Margaret Sanger's solution for the Negro problem, however, was based upon the assumption that black America was beyond hope, that you could not build it up from the in-

side, that the best thing you could do for society would be to get rid of black America in the best way she and her fellow conspirators knew how: by eliminating the black people one child at a time, in a socially approved way, and with the help of black pastors. This is nothing more than a socially sanitized lynching.

We appeal to this Court not to be fooled by the rhetoric of white collar rednecks and Holocaust liberals—and those who have sold out to them—who would distort the meaning of a civil rights statute and let it be used as a tool by those who are trying to cleanse society of its Negro problem (read: exterminate us).

III. THERE IS NO FUNDAMENTAL RIGHT AT ISSUE HERE.

There is no fundamental right to kill a human offspring, prenatally or otherwise. Thus there is no right in this case protected by the Equal Protection provisions of the Ku Klux Klan Act or of the Fourteenth Amendment. Thus, there is no federal jurisdiction to hear this case.

The reason there is no such fundamental right is that this Court's holding in *Roe v. Wade* was in error. In *Roe v. Wade*, this Court resurrected its analysis found in its infamous *Dred Scott* decision by declaring that prenatal human offspring, like *Dred Scott* before them, are not persons under the eyes of the law. Black babies have borne the brunt of this dehumanizing analysis, and this will become even more the case as time goes on. *Roe v. Wade*, and the analysis of *Dred Scott* with it, must be overruled.

A. DRED SCOTT and ROE v. WADE Must Be Overruled.

Everyone knows that the Thirteenth and Fourteenth

Amendments overruled the result of *Dred Scott*, but what about the analysis?

How did this Court come to the conclusion that blacks are not persons within the meaning of the law? By using a two-tiered analysis to determine who has rights under the law. Using this analysis, this Court concluded that in order to be a person within the meaning of the law, one not only had to be a person, one also had to be within a particular class of persons who were intended to be recognized as such. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-407 (1857).

What authority did this Court cite for this proposition? None. It did make reference to provisions of the Constitution and other authorities which, either expressly or implicitly, did not recognize the standing of blacks to assert the full scope of their rights. *Dred Scott*, 60 U.S. at 407-427. But as for the proposition itself that blacks are simply not persons per se, *Dred Scott* was clearly wrong. This Court was unable to cite any authority in *Dred Scott* which actually denied the personhood of blacks per se.

Quite the contrary was true. The law of the slave states themselves rejected this notion. In 1820 the Supreme Court of Mississippi was faced with a case in which a man was prosecuted for murdering a slave. His defense was that a slave is not a "person" within the meaning of the homicide laws. The court rejected this reasoning, saying,

> "Has the slave no rights, because he is deprived of his freedom? He is still a human being, and possesses all those rights, of which he is not deprived by the positive provisions of the law, but in vain shall we look for any law passed by the enlightened and philanthropic legislature of this state, giving even to the master, much less to a stranger, power over the life

> of a slave. Such a statute would be worthy the age of Draco or Caligula, and would be condemned by the unanimous voice of the people of this state, where, even cruelty to slaves, much less the taking away of life, meets with universal reprobation." *State v. Jones*, 2 Miss. (1 Walker) 39 (1820).

****

> "Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase reasonable crea ture is a human being, for the killing a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher, and has not the slave as much reason as a lunatic, an idiot, or an unborn child?" *State v. Jones*, 2 Miss. at 40.

****

> "Jews (in Coke's time) were then regarded in a light more odious than the most abject slave, yet to kill them was murder." *Id.*

****

> "When the northern barbarians overran Southern Europe,they had no laws but those of conquerors, and conquered, victors, and captives, yet even by this savage people, no distinction was recognized between the killing in cold blood, a slave or a freeman. And shall this court, in the nineteenth century, establish a principle, too sanguinary for the code even of the Goths and Vandals, and extend to the whole community, the right to murder slaves with impunity?" *Id.*

The court cited uncontradicted authorities from Virginia and North Carolina for the proposition that in the eyes of

the law, slaves were persons. *State v. Jones*, 2 Miss. at 39.

Even in *Dred Scott* this Court conceded, with respect to the words of the Declaration of Independence which state that all men are created, that those words,

> "...would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood (to include blacks)." *Dred Scott*, 60 U.S. at 410.

The personhood of blacks within the meaning of the law was reaffirmed by the Supreme Court of Mississippi in 1859, two years after *Dred Scott* was decided. *Minor v. State*, 36 Miss. 630 (1859).

The Thirteenth and Fourteenth Amendments were supposed to overrule *Dred Scott*. No longer was the law to use a two-tiered analysis to recognize who has rights under the law---*i.e.* who a person is. Rather, the analysis was to be a simple, straight forward, one-tiered analysis.

The sponsor of the Fourteenth Amendment in the U.S. House of Representatives, John A. Bingham, said that the amendment was "universal" and that it applied to "any human being." Cong. Globe, 39th Cong. 1st Sess. 1089 (1866). His counterpart in the Senate, Jacob Howard, said the amendment applies to "the humblest, the poorest, the most despised." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). And, as U.S. Senator Allen A. Thurman of Ohio would say a short time later, in 1875, the Equal Protection Clause,

> "...covers every human being within the jurisdiction of a State. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State

> from any deprivation of an equal protection of the laws." 3 Cong. Rec. 1794 (1875).

What really happened instead? In *Roe v. Wade* this Court used a two-tiered analysis. This Court said that in order to be a person---one whose rights are recognized in the law, one not only had to show that one is a person, but also that one is within a particular class of persons intended to be recognized as persons. *Roe v. Wade*, 410 U.S. 113, 156-159 (1973).

As in *Dred Scott*, this Court did cite numerous authorities which in fact stand for the proposition that certain human beings---*i.e.* prenatal offspring--- do not have standing in many instances. *Id.* But virtually none of the old common law cases actually addressed the issue of prenatal personhood per se. (The old common law cases which did address the issue of personhood per se, rather than that of standing, found that prenatal human offspring are persons;[2] but apparently this Court in *Roe* was unaware of the existence of these cases.)

2.) *E.g.*, *State v. Cooper*, 22 N.J.L. 52 (1849); *Mills v. Commonwealth*, 13 Pa. 630 (1850); *State v. Murphy*, 27 N.J.L. 112 (1858); *and State v. Winthrop*, 43 Ia. 519 (1876). *See also*, F. Wharton, A Treatise on the Law of Homicide in the United States, 96-97 (1855) (citing *Regina v. West*, *infra*, on the issue of there being no viability requirement, as being authoritative).

For English cases, *see, e.g.*, *Regina v. Sims*, 75 Eng. Rep. 1075 (Queen's Bench 1601); *Rex v. Senior*, 1 Moody CC 346 (1832); *Regina v. Trilloe*, 174 Engl Rep. 674 (1842); *Regina v. West*, 2 C & K 784 (1848) (holding that there is no viability requirement for the protection of prenatal offspring themselves.) For English authorities citing *Regina v. West* with approval, *see*, 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516 (Penrose Am. ed. 6th ed. 1866). *See also*, Coke (3 Inst. 50); Hawkins (1 Hawkins Ch. 13, s. 16); Blackstone (4 Bl. Com. 198); and 1 P. Wms. 345.

the Thirteenth and Fourteenth Amendments, the construction which this Court has placed on the meaning of personhood within those amendments has kept the two-tiered analysis of *Dred Scott* alive. It is time to bury the dead, this time with a stake driven through its heart.

The parallel between *Dred Scott* and *Roe v. Wade* was drawn by Jesse Jackson, who once said (before his political aspirations took hold, and when he still cared first about protecting his people),

> "There are those who argue that the right to privacy is of higher order than the right to life. I do not share that view. I believe that life is not private, but rather it is public and universal. If one accepts the position that life is private, and therefore you have the right to do with it as you please, one must also accept the conclusion of that logic. That was the premise of slavery. You could not protest the existence of treatment of slaves on the plantation because that was private and therefore outside of your right to be concerned.
>
> "Another area that concerns me greatly, namely because I know how it has been used with regard to race, is the psycholinguistics involved in this whole issue of abortion. If something can be dehumanized through the rhetoric used to describe it, then the major battle has been won. ***** That is why the Constitution called us three-fifths human and then whites further dehuman ized us by calling us "niggers." It was part of the dehumanizing process. The first step was to distort the image of us as human beings in order to justify that which they wanted to do and not even feel like they had done anything wrong. Those advocates of taking life prior to birth do not call it killing or murder, they call it abortion. They further never talk about aborting a baby because that would imply something human. Rather they talk about aborting the fetus. Fetus sounds less than human and therefore can be justified." Jackson, Rev. Jesse, *National Right To Life News*, January, 1977, at 5.

Under the Constitution we were always considered at least three-fifths of a person. And for the greater part of a century following the Civil War we were always entitled (at least on paper) to separate but equal treatment. But what about our prenatal offspring? Under *Roe* those among us who have not been born yet are not persons at all. The treatment which our prenatal offspring receive is neither separate nor equal, even on paper; the only treatment which our prenatal offspring receive in the eyes of the law is the callous and willingly blind decision to let the abortionists take them and do with them what they will. Pontius Pilate would be proud of us. Not to mention Margaret Sanger.

This concept of the disposable human being reaches its greatest height when it comes to dealing with America's socially despised poor. As Mr. Jackson also said,

> "Politicians argue for abortion largely because they do not want to spend the necessary money to feed, clothe and educate more people. Here arguments for inconvenience and economic savings take precedence over arguments for human value and human life. I read recently where a politician from New York was justifying abortion because they had prevented 10,000 welfare babies from being born and saved the state $15 million. In my mind serious moral questions arise when politicians are willing to pay welfare mothers between $300 to $1,000 to have an abortion, but will not pay $30 for a hot school lunch program to the already born children of these same mothers." *Id.*

As members of the culture which was the immediate

victim of the *Dred Scott* decision, we sympathize with our fellow human beings who are now similarly victimized by the same analysis under this Court's decision in *Roe v. Wade*. We ask this Court to recognize its mistake and overrule *Roe v. Wade*.

We would like to ask this Court if it is aware of what it means to be told from childhood that prior to the Civil War, your own people were not part of America's heritage? The sons and daughters of white society can look upon George Washington, Paul Revere, and Thomas Jefferson as being part of their heritage. Even the children of recent white immigrants can feel this way. But not black children. They are told that prior to the Civil War, their people were absolutely nothing at all in the view of society. All of those great things of the past—the signing of the Declaration of Independence, the enactment of the Bill of Rights, the emergence of our country as a great nation in the early 1800's—these are all the heritage of those who are white, but not us.

The terrible lie of *Dred Scott* must be exposed. Its impact on us even today is devastating. To this day it tells black boys and girls that in certain ways they do not really belong here, that they are not a full part of society, that they do not share in the full, rich heritage of our nation.

The people must be told that *Dred Scott* was wrong on day one. They must be told that it was a misstatement of the law at that time even according to law of the slave states themselves—that the law in this society even before then had recognized us as being persons just as much as anyone else is, even if the law was incapable of recognizing our right to enjoy our civil liberties just as much as anyone else could.

Similarly, *Roe v. Wade* continues to have even more and more devastating effects as time goes on. As a result of the

erroneous finding of the nonpersonhood status of prenatal human offspring, this Court has now had to sit silently by and watch helplessly as the courts have struck down the protection for prenatal humans against being experimented on or harvested and sold for body parts. *Lifchez v. Hartigan*, 735 F.Supp. 1361 (N.D. Ill. 1990); *affd.* 914 F.2d 260 (1990); *cert. den. sub. nom. Scholberg v. Lifchez*, ___ U.S. ___ (January 22, 1991). And it has been compelled by its reading of federal statutes to conclude that the law prohibits people from trying to protect prenatal offspring from being born with brain damage caused by lead poisoning. *Automobile Workers v. Johnson Controls*, 51 C.C.H. S.Ct.Bull. B1159 (March 20, 1991).

We all know who will be the greatest victims of this. Poor women will be more inclined than rich women will to receive payments for having their offspring experimented on. Poor women will be more inclined to initiate pregnancies for profit so that their offsprings' organs and tissues can be harvested as spare parts for the children of the rich. Poor women will feel greater pressures to accept higher paying jobs which expose their children to possible birth defects.

And that means black women, doesn't it?

The bottom line is that poor people will be paying in blood for the economic and personal advantages of the rich. This lends new meaning to the Bill of Rights: You get the Rights, and we get the Bill.

CONCLUSION

We ask this Court to keep undiluted the race-based test for protection within the meaning of those federal civil rights laws which Congress specifically enacted to protect racial minorities. We ask that this Court not let itself be fooled by those who would let the Ku Klux Klan law be turned inside out and used by those who will do all they can to rid society of its poor, despised, black population through the socially sanitized tool of abortion.

We submit that there is no fundamental right here guaranteed by the United States Constitution, and that thus there is no valid claim under federal law. Thus, the federal courts lack subject matter jurisdiction to hear this case. We ask this Court to overrule *Roe v. Wade* and the analysis of the *Dred Scott* decision (which, unlike the result of the *Dred Scott* decision, remains very much alive today.)

Respectfully submitted,
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Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,

Petitioners,

—v.—

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF VIRGINIA, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, BILL OF RIGHTS FOUNDATION, CENTER FOR CONSTITUTIONAL RIGHTS, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Virginia is one of its statewide affiliates. The ACLU is committed to the enforcement of the rights of women to reproductive choice and gender equality.

The American Jewish Congress is a membership organization of American Jews founded in 1918 which seeks to protect the religious, political and economic rights of Jews and to promote civil rights and liberties for all Americans. The American Jewish Congress is particularly committed to the principle of sexual equality and to vigorous enforcement of the nation's civil rights laws.

For over 77 years, the Anti-Defamation League of B'nai B'rith (ADL) has pursued the objective set out in its charter "to secure justice and fair treatment to all citizens alike." In order to further this objective, ADL has fought steadfastly to remove barriers which have prevented individuals from fully enjoying the rights protected by federal civil rights laws and the Constitution, including the right to privacy, free speech, freedom of religion and equal protection.

The Bill of Rights Foundation, established in 1965, is a small public foundation dedicated to the protection and defense of civil liberties. The Foundation has provided litigation support to defend individuals or groups whose civil liberties are curtailed or threatened.

The Center for Constitutional Rights is a not-for-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

profit public interest law organization dedicated to providing legal support for progressive movements. It was founded in 1966 by lawyers active in the civil rights movement. It litigated *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206 (1990), which obtained injunctive protection for women whose access to abortion clinics had been denied by Operation Rescue blockades.

People for the American Way (PFAW) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAW now has over 290,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our fundamental freedoms, particularly our First Amendment rights.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The issue posed by this appeal is whether federal courts possess power pursuant to 42 U.S.C. §1985(3), 28 U.S.C. §§1343(1) and (2) and the doctrine of pendent jurisdiction to protect women from unlawful force concededly designed to prevent them from enjoying their rights under state and federal laws.[2] The circumstances which gave rise to this case are similar to those which prompted passage of the Civil Rights Act of April 20, 1871, ch. 22, Section 2, 17 Stat. 13 (Ku Klux Klan Act),

[2] Since petitioners concede that their activity is unlawful, no issue of freedom of expression is raised herein. Although petitioners are fond of Orwellian euphemisms, this is a case about the use of unlawful force.

now 42 U.S.C. §1985(3). Petitioners now, like the Klan in the Reconstruction Era, are "forcibly resisting" efforts to ensure the equal enjoyment and free exercise of constitutional rights by a discrete segment of the population. *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. 825, 836 (1983).

Petitioners have attempted to portray §1985(3) as an arcane thicket. In fact, the statute is an exercise in cooperative federalism designed to reinforçe the capacity of state and local authorities to assure that historically vulnerable segments of society enjoy an equal opportunity to exercise their formal legal rights free from mob rule. The statute is premised on an unfortunate, but accurate, historical understanding that lawless groups, hostile to the exercise of rights by vulnerable segments of society, may seek to destroy the real world value of formal legal rights by the use of force and intimidation. While principal responsibility rests with state and local authorities to deploy the police power to protect vulnerable groups against such lawless behavior, Congress enacted §1985(3) to permit federal courts to assist state and local authorities in assuring that all segments of the community, even the historically most vulnerable, have an equal opportunity to enjoy the benefits of the rule of law.

Petitioners Exhibited A Class Based Animus

Petitioners do not even address whether a gender based animus is cognizable under §1985(3), while the government concedes the point. Brief For the United States As *Amicus Curiae* in Support of Petitioner at 10-11 & n.11. Petitioners instead argue that their actions do not, as a matter of fact, violate the class based animus requirement of §1985(3) because their animus is not against all women but only against those women exercising their rights to abortion, and their supporters, both men and women.

Petitioners are wrong in insisting that class based animus be equated with hostility to the target group. Invidious discrimination does not turn on actual ill will. For example, this Court will not hesitate to strike down sex based classifications as invidiously discriminatory notwithstanding a benign purpose.

Nor is it necessary that the conspirators' animus be directed at every individual member of the class. This kind of reasoning would have permitted defendants in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), to eschew the racial animus behind their conspiracy by praising blacks who knew their place and expressly limiting their acts to those blacks seeking to enjoy the full autonomy guaranteed them by the Constitution. Thus, a mob which closed down a clinic for the treatment of sickle-cell anemia -- sought only by blacks -- could not avoid liability under §1985(3) on the ground that their animus was directed only to the treatment offered at the clinic.

The rights that petitioners concededly seek to destroy are vested in, and are uniquely exercisable by, women.[3] It is petitioners' purposeful decision to engage in an unlawful course of conduct that they know will burden the equal ability of women to enjoy their rights under law that establishes the existence of a class based animus within the meaning of §1985(3).

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[3] Petitioners and the government repeatedly argue that because Operation Rescue interferes with both men and women who assist women seeking abortions, as well as the women themselves, they do not have a gender based animus. In doing so they ignore the Court's unequivocal recognition, in *Scott*, that an "animus against Negroes [included] those who championed their cause." 463 U.S. at 836. Indeed, the Solicitor admits, elsewhere in his brief, that a white civil rights activist would have a cause of action "under §1985(3) if he was the victim of an assault motivated by bias against blacks." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 9 n.9. Men who work to help women realize their right to an abortion are in exactly the same position *vis-a-vis* women as white civil rights workers are to blacks.

Petitioners Hindered The Exercise Of Legal Rights

The Court has also made clear that §1985(3) creates no rights, providing only a remedy for injury to the exercise of independently existing legal rights. *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979). There are two sets of legal rights protected against private interference that are violated by petitioners' lawless acts. First, the ability of thousands of women to travel across state lines in an effort to exercise their constitutional rights is directly impeded by petitioners' use of unlawful force. *Griffin v. Breckenridge*, 403 U.S. 88; *United States v. Guest*, 383 U.S. 745 (1966).

Second, the ability of women to enjoy the equal benefit of Virginia's laws prohibiting criminal trespass, assault and the unlawful use of force is threatened by petitioners' conspiracy. Petitioners' tactics openly depend upon their capacity to temporarily overwhelm local law enforcement agencies' ability to protect the state law rights in question.

There Is Pendent Jurisdiction Over The Claims

Given the strength of the case for federal jurisdiction under 42 U.S.C. §1985(3) and 28 U.S.C. §§1343(1) and (2), and the existence of a powerful alternative basis of federal jurisdiction under 28 U.S.C. §1331 over a cause of action for injunctive relief based directly on the constitutional right to travel, no serious question exists concerning the power of the trial court to issue injunctive relief under Virginia law pursuant to the doctrine of pendent jurisdiction. Moreover, since the American rule on attorneys' fees authorizes an award of attorneys' fees and costs in connection with litigation made necessary by the bad faith conduct of the defendant, no basis exists to disturb the result below, regardless of the outcome of the dispute over the applicability of §1985(3). Accordingly, *amici* question whether this case provides an appropriate vehicle for considering the scope of §1985(3).

ARGUMENT

THE COURT BELOW POSSESSED POWER UNDER 42 U.S.C. §1985(3) AND THE DOCTRINE OF PENDENT JURISDICTION TO ENJOIN PETITIONERS FROM ENGAGING IN LAWLESS MOB ACTION DESIGNED TO DEPRIVE RESPONDENTS OF THEIR EQUAL ENJOYMENT OF THE RULE OF LAW

Petitioners concede that they conspired to use unlawful force to prevent respondents from exercising their rights under state and federal law. They concede that Virginia authorities had a right, indeed a duty, to prevent their unlawful behavior.

Nevertheless, they argue that a federal court lacked power to assist Virginia authorities in protecting respondents' legal rights. Petitioners argue, first, that an unlawful conspiracy directed at women does not fall within the coverage of §1985(3); second, that their conspiracy was not motivated by a class based animus directed at women; and, third, that their conspiracy did not interfere with federally protected rights. Each argument was correctly rejected by the lower courts in this case and by the overwhelming majority of the courts to have confronted the issue.

A. Petitioners' Conspiracy Was Motivated By An Invidiously Discriminatory Animus Toward Women

1. Women Constitute A Cognizable Class Protected Under §1985(3)

This Court has construed the "equal protection . . . equal privileges and immunities" language in §1985(3) to require "some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. at 102. Although the Court has never determined the full extent of the protection of §1985(3), it held in *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, that groups united solely by economic interest did not fall within the protection of the statute. This case does not require the Court to define the parameters of the class based animus requirement, but raises only whether the statute's protection extends to the exercise of fundamental constitutional rights by members of other groups whose immutable characteristics have made them historically vulnerable to invidious discrimination.

When Congress acted in 1871 to provide statutory protection pursuant to Section 5 of the Fourteenth Amendment for the equality values protected by Section 1 of the Fourteenth Amendment, it drew no distinctions among groups vulnerable to invidious discrimination. While racial minorities, whose members have historically been subjected to the type of invidious discrimination that the Fourteenth Amendment sought to eradicate, are the paradigm of groups protected under §1985(3), nothing in the text of §1985(3) or its legislative history justifies a construction that excludes from the statute's protection other groups, such as women, whose history of subordination have rendered them similarly vulnerable to invidious patterns of discrimination. *Reed v. Reed*, 401 U.S. 71 (1971); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

Indeed, the discussion of the applicability of §1985 (3) stressed its inclusive nature. Senator Edwards, the floor manager of the bill in the Senate, noted:

> [If a conspiracy is formed against a person] because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it."

Cong. Globe, 42d Cong., 1st Sess. 567 (1871).

Rep. Buckley, a leading supporter in the House,

stated:

> [t]he proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women . . . .

Cong. Globe, 42d Cong., 1st Sess. 190 (1871).

Not surprisingly, therefore, virtually every federal court to have passed on the issue has recognized that women are within the protection of §1985(3). *New York State NOW v. Terry*, 886 F.2d 1339, 1358-59 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206 (1990); *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984); *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1241-43 (3d Cir. 1978)(*en banc*), *vacated on other grounds*, 442 U.S. 366 (1979); *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).[4]

Alternatively, the class can be described, as it was by the district court, as women seeking abortions. *NOW v. Operation Rescue*, 726 F.Supp. 1483, 1493 (E.D.Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990). That that class does not include all women but only those exercising a particular, fundamental constitutional right, does not make it any less gender based. *See* pp.9-11, *infra*. Nor does it raise the specter petitioners paint of subjecting all political protesters to §1985(3) liability. The standard for establishing a violation of §1985(3) is a stringent one. Petitioners cite to no class based animus in their hypothetical examples of liability for political protests.

[4] *Amici* believe that the United States overstates the concern articulated by Justice Stevens in *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. at 385 & n.7 (Stevens, J., concurring). Justice Stevens noted that §1985(3) did not grant women protection from private acts of sex discrimination because the Equal Protection Clause of the Fourteenth Amendment applies solely to state action. His position was adopted by the Court in *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825. We do not believe that Justice Stevens intended to exclude women from the protection of §1985(3) in the context of rights, such as the right to interstate travel, that run against private persons, as well as the state.

2. The Conspiracy Was Directed At Women

Petitioners deny overt hostility toward women. However, animus need not be hostile to be actionable. This Court's gender discrimination jurisprudence has long recognized that invidious discrimination often results from a benign animus or purpose. *Orr v. Orr*, 440 U.S. 268 (1979); *Mississippi University for Women v. Hogan*, 458 U.S. 718. Moreover, the Court has forcefully reiterated its refusal to permit benign motives to shield purposefully discriminatory treatment of women. *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Craig v. Boren*, 429 U.S. 190 (1976). *See also Taylor v. Louisiana*, 419 U.S. 522 (1975); and *Duren v. Missouri*, 439 U.S. 357 (1979).

Similarly, this Court's recent affirmative action jurisprudence is premised upon a willingness to invalidate practices that are benignly motivated solely because they had an excessively adverse impact on whites. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). *See also Palmore v. Sidoti*, 466 U.S. 429 (1984). Where, as here, a practice that is knowingly and purposefully devastating to the rights of women is at issue, it is far too late in the day to seek shelter in a benign motive.

Petitioners also claim that they lack the requisite class based animus because their actions are directed at abortion, not women. However, because women -- and only women -- seek abortions, petitioners' unlawful con-

spiracy intentionally deprives women -- and only women -- of the enjoyment of full reproductive autonomy.

Petitioners' attempt to rely on *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *General Electric Co. v. Gilbert*, 429 U.S. 115 (1976), is misguided. In those cases, the Court held that the refusal to extend disability *benefits* to normal pregnancy was not *per se* discrimination on the basis of sex. However, the Court retreated from and significantly qualified those rulings in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), when it made clear that imposing *burdens* on women on account of pregnancy was illegal sex discrimination, even if withholding benefits was not. *Id.* at 142. Thus, petitioners' reliance on *Geduldig*, *Gilbert* and *Harris v. McRae*, 448 U.S. 297 (1980), ignores the fundamental distinction between failing to grant women affirmative benefits to deal with the economic consequences of pregnancy and imposing devastating burdens upon them solely because of their reproductive status. In sharp contrast to those cases, all of which involved the extension of economic benefits to pregnancy related conditions, petitioners' unlawful conspiracy is designed to intimidate and coerce women into continuing unwanted pregnancies. Accordingly, it "burdens" women within the meaning of *Satty* "because of their different role" and subjects them to "a substantial burden that men need not bear." 434 U.S. at 142.

Moreover, Congress has expressly repudiated the rationale of *Geduldig*. After the Court extended *Geduldig* to Title VII in *Gilbert*, Congress enacted the Pregnancy Discrimination Act, amending Title VII to make crystal clear that discrimination on the basis of pregnancy is sex discrimination. 42 U.S.C. §2000e(k). S.Rep. No. 331, 95th Cong., 1st Sess. 2-3 (1977); H.Rep. No. 948, 95th Cong., 2d Sess. 2 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4750. Whatever vitality the discredited *Geduldig* rationale may retain in constitutional cases arising directly under the Equal Protection Clause, it may not be applied to deny protection to women invoking statutes enacted by Congress in an effort to combat discrimination. Here, where the question is what constitutes sex based animus for purposes of a civil rights statute, this Court should honor the congressional determination that knowing and purposeful imposition of a burden upon a woman on the basis of pregnancy is discrimination on the basis of sex. *See International Union v. Johnson Controls*, ___ U.S. ___, 111 S.Ct. 1196 (1991); *Newport News Shipbuilding and Drydock Co. v. E.E.O.C.*, 462 U.S. 669 (1983). *See also Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 409 (1972).

Finally, petitioners mistakenly rely on Fourteenth Amendment cases requiring proof of "purposeful" discrimination where facially neutral practices exert a disparate impact on a protected class. *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979). *Feeney* upheld the constitutionality of a gender neutral policy favoring veterans that had a significant adverse impact on women's civil service employment opportunities, but that also affected large numbers of men. It did not approve a course of unlawful conduct, like petitioners', that predictably and purposefully burdens only women and their service providers.

Petitioners confuse the concepts of motive and purpose. Petitioners' motive may be to prevent abortion, but their avowed purpose is to prevent women and their service providers from engaging in a lawful activity that, while abhorrent to petitioners, is of unique significance to women. Petitioners cannot escape liability for the consequences of their intentional conduct by asserting they were doing the right thing in good faith:

> [O]f all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . [T]hose who torment us for our own good will torment us without

end for they do so with the approval of their own conscience.

Downs v. Sawtelle, 574 F.2d 1, 12, n.14 (1978), *quoting* Lewis, The Humanitarian Theory of Punishment, 6 *Res Judicatae* 224, 228 (1952).

B. Petitioners' Conspiracy Impeded The Equal Enjoyment Of Rights Protected Against Private Interference By Federal And State Law

This Court has ruled that the rights at stake in a §1985(3) case must involve prohibitions directed against private conduct, as well as state action. *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825; *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. 366. In this case, at least two sets of legal rights protected against private interference are violated by petitioners' lawless acts.

1. The Right To Travel

When members of a protected group seek to cross state lines to exercise a constitutionally protected right, they enjoy the protection of §1985(3) against mob violence; it matters not at all whether unlawful force is directed against them before they cross the state line, as they cross the state line, or at the place of their ultimate destination.[5] *E.g.*, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); *In re Debs*, 158 U.S. 564 (1895); *Edwards v. California*, 314 U.S. 160, 171 (1941); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745; *Griffin v. Breckenridge*, 403 U.S. 88; *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Doe v. Bolton*, 410 U.S. 179 (1973); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

The right to interstate travel was first recognized in *Crandall v. Nevada*, 73 U.S. 35, when this Court invalidated Nevada's attempt to tax persons leaving the state. While its constitutional locus has been described in various ways,[6] its central premise is that an inherent corollary of the federal union must be freedom to cross state lines in search of a better life or to exercise a legal right. *Edwards v. California*, 314 U.S. 160; *United States v. Guest*, 383 U.S. at 757, 759. Moreover, it is now clear that the right to interstate travel is "assertable against private as well as governmental interference." *Griffin v. Breckenridge*, 403 U.S. at 105.[7]

The right to travel is also closely related to the right to engage in interstate commerce. Access to commerce is fundamental to the right to travel.[8] Conversely, the freedom to travel is central to the rights protected by the Commerce Clause. The right to engage in interstate commerce would be meaningless if citizens could not

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[5] This case, therefore, raises the issue left open in *Griffin v. Breckenridge*, 403 U.S. at 95-96, as to the correctness of *Collins v. Hardyman*, 341 U.S. 651 (1951), on its facts. Since the plaintiffs in *Collins* did not allege an interference with the right to interstate travel, the *Collins* Court did not pass on its legal significance.

[6] At least three sources of constitutional support have been noted for the right of interstate migration: (1) the Commerce Clause; (2) the privileges and immunities clause; and (3) the inherent nature of the federal union.

[7] Location of the right to travel in the Privileges and Immunities Clause of Article IV, as urged by the Berrigan brief (Berr.Br. at 21-23), would *not* limit the scope of the right only to state interference. Professor Bogen, cited in the Berrigan brief as supporting the inference of the right to travel from Article IV, argues that Article IV provides the "best basis" for securing constitutional protection against *private* interferences with the right to travel. *See* Bogen, "The Privileges and Immunities Clause of Article IV," 37 Case W.L.Rev. 794, 852 (1987).

[8] *See Guest*, 383 U.S. at 757 ("The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union").

travel freely to commercial destinations, free from hindrance linked to their race or sex. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Consequently, the Commerce Clause protects the interstate movement of persons as a component of interstate commerce. *See Guest*, 383 U.S. at 758-59 (1966); *Edwards v. California*, 314 U.S. at 172; *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885).[9] Moreover, the restriction against undue interference with interstate commerce applies to private as well as state action. *See In re Debs*, 158 U.S. at 581 ("If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?").

In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court invalidated a prohibition on publishing information about activities that were unlawful in Virginia but lawful in New York.[10] The clear assumption of the *Bigelow* Court was that persons had a right to receive information about lawful activities in other states in order to determine whether to cross state lines to engage in the activity. Surely, the *Bigelow* Court did not contemplate a federal right to receive information needed to make an informed judgment whether to cross state lines only to have both rights subject to a private veto at the point of destination.

Petitioners seek to escape the unequivocal holdings

[9] The Commerce Clause also protects the right of persons to do business in another state, *see e.g., Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891), and prevents obstructions on the highways of interstate commerce. *See In re Debs*, 158 U.S. at 591.

[10] *Bigelow* dealt with the pre-*Roe v. Wade* situation in which abortions were banned in Virginia, but lawful in New York. The case involved an attempt to punish a Virginia newspaper for running advertisements for New York abortion services.

in *Griffin* and *Debs* that private interference with the right to interstate travel is cognizable under §1985(3) by attempting to impose yet another scienter requirement on the statute. According to petitioners, a conspirator must not only be acting pursuant to a class based animus, he must also have a specific subjective intent to violate the right to travel. But this Court has uniformly rejected attempts to graft specific intent requirements from criminal to civil statutes, recognizing that lawless elements would often be able to escape civil liability by denying the requisite specific intent. Thus, once a conspirator embarks on an unlawful course of conduct aimed a preventing members of a protected class from enjoying their legal rights, the victims are not obliged to show that the conspirators were aiming at a specific right. It is enough that a covered right was impaired. *E.g., Griffin v. Breckenridge*, 403 U.S. at 102 n.10 (1971); *Monroe v. Pape*, 365 U.S. 167 (1961).[11]

In addition, even if some form of specific intent to violate the right to travel were required, petitioners' claims that they had no such specific intent are contradicted by the facts. The intent of those setting up a blockade is, by definition, to deprive others of free movement. Petitioners sought to prevent women seeking health care services from moving into the clinics. Thus, petitioners' claim that the impeding of travel was merely an "incidental" byproduct of their anti-abortion activities

[11] Petitioners' attempt to use the remand instructions in *Griffin*, 403 U.S. at 103, as support for a specific intent requirement is clearly futile. The quoted language was designed to spell out *permissible* patterns of proof on remand; not to establish requirements. The citation to *United States v. Guest*, 383 U.S. at 760, is equally unavailing, since *Guest* is a criminal case. This Court has imposed a modified requirement of specific intent in criminal prosecutions under the Ku Klux Klan Act, but has explicitly refused to do so in civil contexts. *Compare Screws v. United States*, 325 U.S. 91, 106-07 (1945), with *Monroe v. Pape*, 365 U.S. at 187.

lacks merit and is disingenuous at best (Pet.Br. at 30).[12]

While every interference with the successful completion of an interstate trip would not constitute a violation of the right to travel, an interference motivated by a specific intent to frustrate the exercise of a constitutional right would satisfy even the narrowest version of the right.[13]

Petitioners and their *amici* attempt to persuade the Court that a violation of the right to travel can arise only in a few narrow factual contexts (Pet.Br. at 26-27; Berr.Br. at 16-17; U.S.Br. at 24-26). The case law, however, does not support such a limited interpretation of this right. While right to travel violations have been found in cases of discrimination against nonresidents, *see Dunn v. Blumstein*, 405 U.S. 330; *Shapiro v. Thompson*, 394 U.S. 618, and in situations where defendants actually restricted travel across state borders, *see Edwards v. California*, 314 U.S. 160; *Crandall v. Nevada*, 73 U.S. 35, these contexts are by no means the only ones in which the right to travel can be violated.

In *Griffin*, for example, the case most analogous to the present case, the Court held that the defendants deprived the class members of the right to travel in violation of §1985(3), despite the absence of any law or conduct that favored residents over nonresidents. In fact, both plaintiffs and defendants in *Griffin* were Mississippi residents, and the deprivation of rights occurred in Mississippi. 403 U.S. at 89-90. In fact, it has been clear in the law since *Crandall v. Nevada*, 73 U.S. 35, that it is not necessary to discriminate between residents and nonresidents in order to establish a violation of the right to travel.

In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, the Court held that the motel's discrimination implicated the right to travel in interstate commerce despite the fact that one quarter of its customers were state residents. *Id.* at 258. Further, the motel's discriminatory policy was directed at *all* blacks, regardless of their resident status. *Id.* at 243; *see also Katzenbach v. McClung*, 379 U.S. 294, 300 (1964)(restaurant's discrimination implicated right to travel in interstate commerce even though restaurant served mostly local patrons). Thus, the fact that the clinics blockaded by petitioners serve local as well as out of state patients is immaterial for purposes of establishing a right to travel violation.

Finally, petitioners lamely attempt to argue that the right to unimpeded travel ends at a state's border (Pet. Br. at 26). The proper issue here, however, is not whether petitioners sought to prevent class members

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[12] It is important to note that in January, 1989, the United States Court of Appeals for the Second Circuit ruled that Randall Terry and Operation Rescue, through their abortion clinic blockades, did in fact violate §1985(3), in that such activities deprived the women seeking the services of abortion facilities of their constitutional right to travel. *New York State NOW v. Terry*, 704 F.Supp. 1247, 1260 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206 (1990). From that date, petitioners Terry and Operation Rescue were on notice that their activities were in violation of §1985(3), and they continued to engage in those activities. This conduct is certainly relevant here on the issue of intent.

[13] The recognition that persons who cross state lines to engage in constitutionally protected activity are entitled to federal protection under §1985(3) at their respective destinations is wholly consistent with the underpinnings of this Court's right to travel cases. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 215; *Dunn v. Blumstein*, 405 U.S. 330. In granting enhanced constitutional protection to "newcomers," this Court recognized that established residents were more likely to exercise influence on local government than newly arrived persons. Where, as here, private groups seek to use force to prevent "outsiders" from engaging in constitutionally protected activity, no political tie exists between the "outsiders" and the local authorities whose assistance is required to prevent the private acts of lawlessness. Thus, in the context of persons crossing state lines to engage in constitutionally protected activity, the wisdom of providing a federal judicial backstop to local police power is obvious.

from actually crossing a state border.[14] Petitioners acted with the undeniable purpose of preventing women from reaching their ultimate destination, the health care facility that was their very reason for crossing the state line in the first place. Under the clear holdings of this Court, such conduct violates the right to travel.

A right to travel limited to the right to cross state lines would bear little resemblance to the right to travel that this Court has described as "fundamental to the nature of our Federal Union." *Guest*, 383 U.S. at 757. Though petitioners and their *amici* strive in vain to find support for their cramped reading of the right to travel as limited to mere passage across state borders, this Court has consistently described the right to travel in terms that imply no such limitation. *See Kent v. Dulles*, 357 U.S. 116, 126 (1958)("Freedom of movement across frontiers in either direction, *and inside frontiers as well*, was a part of our heritage")(emphasis added); *Williams v. Fears*, 179 U.S. 270, 274 (1900)("the right, ordinarily, of free transit *from or through* the territory of any state is a right secured by the Fourteenth Amendment and by other provisions of the Constitution")(emphasis added). *See also Crandall v. Nevada*, 73 U.S. at 43-45.[15] The result in *Griffin* would have been no different if the defendants had obstructed the movement of the passengers at a point nearer to their destination instead of on the open highway.

[14] While this Court has not explicitly recognized a right to intrastate travel, it has left open the possibility that such a right exists. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255-56 (1974) (whether "to draw a constitutional distinction between interstate and intrastate travel [is] a question we do not now consider . . . ."). In fact, the United States Court of Appeals for the Second Circuit has found such a right. *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990); *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971).

[15] Commentators have also recognized a broad right to travel as being fundamental to this nation's heritage. For example, Professor Chafee, cited in the Berrigan brief, wrote of the historic importance of "freedom of movement across frontiers in either direction and inside frontiers." Chafee, *Three Human Rights in the Constitution of 1787* at 187 (continued...)

2. Section 1331 Jurisdiction Exists To Protect The Right To Travel

Since the federal Constitution provides substantive protection of the right to travel against private interference, either as a privilege and immunity of citizenship, an essential element of federalism, or as a consequence of the right to engage in interstate commerce, a cause of action for prospective injunctive relief for interference with the right to travel springs directly from the Constitution itself, with subject matter jurisdiction granted by 28 U.S.C. §1331. *In re Debs*, 158 U.S. 564; *Ex parte Young*, 209 U.S. 123 (1908); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

While controversy surrounds the implication of a cause of action for damages directly from the Constitution, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), no serious question exists as to the power of a federal court to grant prospective injunctive relief founded directly on the Constitution. *E.g., Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bivens*, 403 U.S. at 400 (Harlan, J. concurring). Thus, a combination of a cause of action springing directly from the constitutional right to travel and general federal question jurisdiction provides an alternative source of power for the trial court's grant

[15] (...continued)
(1956). Sir William Blackstone also discussed a right to travel in broad terms, stating that the personal liberty of individuals "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Blackstone, *Commentaries on the Laws of England* 134 (1856).

of injunctive relief in aid of the right to travel.[16]

3. The Equal Enjoyment Of Rights Under State Law

The rights of women to experience the equal enjoyment of Virginia's laws prohibiting criminal trespass and the unlawful use of force is also threatened by petitioners' conspiracy. The ability to enjoy the security of a civilized society of laws rests, in large part, on the ability to enjoy the fruits of local laws setting forth the minimum standards of personal security -- laws that forbid physical assault and unwanted physical contact; laws that protect against intimidation and coercion. Petitioners knowingly deprived women of the protection of those laws in an effort to deny them the equal enjoyment of citizenship. Indeed, petitioners' tactics openly depend upon their ability to overwhelm and otherwise "hinder" local law enforcement agencies' capacity to protect the state law rights in question.

In *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. at 833, this Court found it unnecessary to decide whether the destruction of rights protecting bodily security granted under state law could be the predicate for §1985(3) protection. Where, however, a private conspiracy purposefully seeks to deprive a protected group of the equal enjoyment of state law rights that are fundamental to the enjoyment of the rule of law, no basis exists to confine the protection of §1985(3) to federally protected rights.

Nothing in the text of §1985(3) or its jurisdictional counterpart, 28 U.S.C. §§1343(1) and (2), suggests that the equal enjoyment of rights under the statute was intended to extend solely to rights granted under federal law. Since Congress confined the reach of its companion statute, now codified as 42 U.S.C. §1983 and 28 U.S.C. §1343(3), to federal rights,[17] the obvious textual conclusion is that Congress intended to protect vulnerable groups from private conspiracies designed to destroy the value of rights under both state and federal law.

Moreover, given the importance of state law rights in 1871, Congress must have intended to include them under §1985(3)'s umbrella. At the time the Ku Klux Klan Act was enacted, no provisions of the Bill of Rights were applicable to the states. *Barron v. City of Baltimore*, 7 Pet. 243, 8 L.Ed 672 (1833). Indeed, the doctrine of "selective incorporation" of the Bill of Rights was fully 60 years in the future. Thus, if the Reconstruction Congress intended §1985(3) to assist newly freed slaves to enjoy many of the fundamental values protected by the Bill of Rights free from Ku Klux Klan violence, it must have intended its protection to attach when unlawful private conspiracies threatened vulnerable persons for exercising rights protected against private interference by state law.

C. The Grant Of Injunctive Relief Must Be Affirmed As An Exercise Of Pendent Jurisdiction

Given the strength of the case for federal jurisdiction pursuant to U.S.C. §1985(3) and 28 U.S.C. §§1343 (1) and (2), and the existence of an alternative source of authority created by a cause of action for equitable relief

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[16] Since general federal question jurisdiction was not conferred on the federal courts until 1875, Congress created no redundancy between §1985(3) and the constitutional cause of action when it passed the Ku Klux Klan Act. In 1871, the constitutional cause of action would have lacked a subject matter base.

Under the prevailing reading of Rule 8, Fed.R.Civ.P., respondents were not obliged to have specifically pleaded §1331 jurisdiction, so long as the facts giving rise to federal jurisdiction were before the court.

[17] *See Maine v. Thiboutot*, 448 U.S. 1 (1980); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1987).

based directly on the constitutional protection of the right to travel and 28 U.S.C. §1331, no serious question exists concerning the power of the trial court to issue injunctive relief under Virginia law pursuant to the doctrine of pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S 715 (1966). In *Oneida Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974), this Court noted that federal courts may exercise pendent jurisdiction over state claims unless the federal claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise so completely devoid of merit as not to involve a federal controversy." While reasonable people may disagree over whether a cause of action exists under §1985(3) or springs directly from the right to travel itself, *amici* do not believe that reasonable people can differ over the substantiality of the arguments in favor of a federal cause of action. Indeed, two circuit courts have recently explicitly endorsed them. Thus, the exercise of pendent jurisdiction by the trial court was unquestionably proper. *See Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909).

Moreover, since the American rule on attorneys' fees authorizes an award of attorneys' fees and costs in connection with litigation made necessary by the bad faith conduct of the defendant, no basis exists to disturb the result below, regardless of the outcome of the dispute over the applicability of §1985(3). Indeed, the strong probability that the Court's decision on the §1985 (3) issue will not affect the result below argues strongly in favor of declining to issue what would be nothing more than an advisory opinion granted to a lawless conspiracy.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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JAYNE BRAY, *et al.*,
Petitioners,
v.
ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF 29 ORGANIZATIONS COMMITTED TO WOMEN'S HEALTH AND WOMEN'S EQUALITY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

(List of *Amici Curiae* on Inside Cover)

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AMICI CURIAE

The National Abortion Rights Action League Foundation
Abortion Rights Council of Minnesota
American Association of University Women
American Medical Women's Association, Inc.
B'nai B'rith Women
California Women Lawyers
Catholics for a Free Choice
Center for Women Policy Studies
Coalition of Labor Union Women
Equal Rights Advocates, Inc.
Feminist Majority Foundation
Lambda Legal Defense and Education Fund, Inc.
Mexican American Women's National Association
National Association of Commissions for Women
National Black Women's Health Project
National Council of Jewish Women
National Federation of Business and Professional Women's Clubs, Inc.
National Institute for Women of Color
National Women's Conference Committee
National Women's Health Network
National Women's Party
National Women's Political Caucus
Northwest Women's Law Center
Voters for Choice
Women's International League for Peace and Freedom
Wider Opportunities for Women
Women's Medical Fund, Inc.
Yale Journal of Law and Feminism
Zero Population Growth

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-985

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF 29 ORGANIZATIONS COMMITTED TO WOMEN'S HEALTH AND WOMEN'S EQUALITY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

(List of *Amici Curiae* on Inside Cover)

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations that are committed to women's health and women's equality. We share a common concern for the protection of women's constitutional and statutory rights, including the constitutional right to travel and the constitutional right to reproductive autonomy.

In an effort to bring to the Court's attention the perspectives of the women who have been the targets of petitioners' conspiracy to deprive them of their constitutional rights, *amici curiae* have collected letters from women and their supporters, including physicians, clinic staff

and volunteer clinic escorts, who have been subjected to the use of force, violence and intimidation by those who, like petitioners, participate in blockades of abortion clinics.[1] These letters graphically illustrate that the motivation behind petitioners' conspiracy is to deprive women of the equal protection of the law and the equal privileges and immunities under the law.

The more specific interests of each of the organizations that have joined together here as *amici curiae* are set forth in Appendix A.[2]

SUMMARY OF ARGUMENT

This case arises out of petitioners' conspiracy to engage in physical blockades that prevent women from obtaining health care at certain medical clinics that provide abortion and related services including counseling and information concerning abortion. The purpose of petitioners' conspiracy is to deprive women, through force, violence, and intimidation, of the equal protection of the laws and equal privileges and immunities under the law. Consequently, because the animus or motivation behind this conspiracy is to deprive a protected class of their equal rights, petitioners' conspiracy falls squarely within the scope of activity proscribed by 42 U.S.C. § 1985(3).

The extensive excerpts from letters by women seeking to exercise their rights and physicians and volunteer clinic escorts who seek to help those women, demonstrate that petitioners' conspiratorial purpose is to deprive women of the equal protection of the laws. As one letter stated,

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[1] These letters have been lodged with the Clerk of this Court. Letters quoted in this brief will each be referenced by a number, preceded by the letter "C" (e.g.: "C1") and the texts of all letters quoted herein are reproduced in full in Appendix B.

[2] *Amici curiae* file this brief with the consent of all parties and letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

> I am convinced that the agenda of Operation Rescue and similar organizations is not to exercise free speech, rather it is to bully and intimidate women from utilizing clinic services . . . . Physical intimidation and verbal assault are the primary tools employed against women . . . . C14.

In some cases, those blockading the clinics are successful in preventing women from entering the clinics:

> I also remember the faces of patients arriving for appointments, seeing the blockades and having to react immediately. These were women's faces showing fear and confusion, panic and crisis. If they summoned all their courage and tried to get inside, with the help of escorts, O.R. [Operation Rescue] still pursued them, chasing, yelling and grabbing. Many women simply turned around and went home. C74.

These letters describe the physical obstacles erected by petitioners' blockades faced by women seeking to enter the clinics.

> Far from being a peaceful demonstration of opposition to abortion, Operation Rescue physically blocked access to allow anyone to enter the clinic. The group was overwhelmingly made up of men whose presence intimidated anyone who sought entrance to the clinic. C73.
>
> I remember O.R.'s [Operation Rescue] pushing and shoving and kneeing and elbowing, as they charged in large numbers through and over lines of pro-choice volunteers toward clinic doors and entranceways. C74.

The letters also describe the intimidating and violent nature of the acts undertaken by petitioners and others who attempt to close down clinics in furtherance of the conspiracy against women. At a blockade in Texas,

> [T]he rescuers completely blocked the front door . . . . A clinic worker had to get out of the building so she could give the trespass warning, as is required by Texas law. We went to the back door . . . . A

group of rescuers blockaded that door as well. When we opened the door so the clinic worker could get out, they attempted, by main force, to shove their way through the door so they could get to the clinic. We managed to prevent this, but I was bruised up pretty thoroughly and got my shoulder strained so severely that a doctor's care was required. C38.

As one woman who was confronted with a blockade when she arrived at a clinic to have an abortion said, "There is absolutely no excuse for the hostile, intimidating behaviors that these anti-choice protestors direct towards women seeking abortions." C61.

ARGUMENT

I. WOMEN ARE MEMBERS OF A VALID CLASS PROTECTED UNDER 42 U.S.C. § 1985(3).

A. A Sex-Based Class Satisfies The Statute's Class Requirement.

As respondents persuasively argue in their brief to this Court, both the broad language of the statute and the statute's legislative history support a finding that women form a cognizable class under 42 U.S.C. § 1985(3).[3] Indeed, petitioners do not challenge this interpretation.

Nothing in the language of the statute limits its application only to African-Americans or other racial classes. To the contrary, the statute employs broad language, extending protection to "any person or class of persons" who are the subject of private conspiracies to deprive them of the equal protection of the laws. Moreover, as

[3] As discussed in respondents' brief, this Court, in *Griffin v. Breckenridge*, interpreted the statutory requirement that the conspiracy must be formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," to mean that the conspirators' action must be motivated by a "class-based invidiously discriminatory animus." 403 U.S. 88, 102 (1971).

respondents demonstrate, the legislative history of 42 U.S.C. § 1985(3) reveals that Congress contemplated classes of people not specifically identified at that time, such as women, as people who might be subjected to a conspiracy motivated by class-based discrimination to interfere with their rights. All seven of the United States Courts of Appeals that have considered the issue have held that women are a class protected by this statute.[4] This Court has previously assumed, without deciding, that sex—an immutable characteristic like race—is a valid basis for identifying a class protected under section 1985(3). *Great Am. Fed. Savings & Loan v. Novotny*, 442 U.S. 366 (1979); *see id.* at 389 n.6 (White, J., dissenting).

B. Petitioners' Conspiracy Interferes With Rights Possessed By Potentially All Women.

The ultimate goal of petitioners' conspiracy is to prevent women from exercising their legal rights, including the right to travel anywhere in the United States[5] in order to obtain necessary medical care including abortions and related services.[6] Petitioners and the United

[4] *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988); *Long v. Laramie County Community College*, 840 F.2d 743 (10th Cir.), *cert. denied*, 488 U.S. 825 (1988); *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984); *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499 (9th Cir. 1979); *Novotny v. Great Am. Fed. Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978) (*en banc*), *vacated on other grounds*, 442 U.S. 366 (1979); *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978).

[5] *Amici curiae* agree with respondents that the Court need not reach respondents' claim concerning the deprivation of their right to privacy, and that a remand for consideration of this issue may be appropriate if the Court deems consideration of that issue necessary.

[6] Throughout the history of abortion services in the United States, women have been forced to travel interstate to obtain abortions, both during the era when abortion was illegal in many states, before

States erroneously assert that this conspiracy is not discriminatory because the blockades merely have a "disproportionate effect on women."[7] Petitioners' blockades, however, constitute deliberate, not somehow accidental, interference with women's exercise of their rights, and they deliberately interfere, not just "disproportionately," but exclusively with the constitutional rights of women.[8] The class targeted by petitioners' conspiracy is, therefore, clearly sex-based.

Roe v. Wade, 410 U.S. 113 (1973), and continuing today. In recent years, an increasing shortage of abortion providers has required more and more women to travel to other states to obtain abortion services. Thirty-four states suffered a decrease in the number of abortion providers between 1985 and 1988. According to a report published in 1990, as of 1988, no physician performed abortions in eighty-three percent of counties in the United States. In some states, such as North Dakota and South Dakota, only one abortion provider remains statewide. As a result, many American women live hundreds of miles from the nearest provider. Henshaw and Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persps. 102 (May/June 1990); S. Henshaw, J.D. Forrest and J. Van Vort, *Abortion Services in the United States, Each State and Metropolitan Area, 1984 and 1985* 100-105 (1987), and additional unpublished data from the Alan Guttmacher Institute. The harassment, blockades, and violence engaged in by petitioners and other similar organizations are contributing factors to this dramatic and dangerous decline in the availability of abortion services. *See* Letter C62 in Appendix B.

[7] Brief for the United States as *Amicus Curiae* at 6.

[8] The fact that doctors, clinic administrators, clinic employees, and volunteer clinic escorts are also targets of petitioners' conspiracy does not detract from the argument that the class is women, nor does it detract from the argument that petitioners are motivated by a sex-based animus. The animus of petitioners is to deprive members of the class—women—of their constitutional rights. The other individuals are present, and petitioners confront them, because they are actively supporting women in the exercise of the rights with which petitioners seek to interfere. The legislative history of the statute and the prior decisions of this Court make clear that the fact that conspirators target "supporters" of the members of the class is not inconsistent with a showing that the conspirators have the requisite class-based animus. *United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, 836 (1983).

Petitioners misconstrue the class that respondents have identified, incorrectly identifying it as "women seeking abortions." Respondents have clearly alleged that the class for whom protection is sought under section 1985(3) in this case is women, and the nature of the conspiracy in which petitioners are engaged supports this definition of the class.[9] Petitioners misleadingly label the alleged class in an attempt to imply that it is merely a "sub-class" of women.[10] The reality is that the vast majority of women may, at some time in their lives, require the medical services—including abortions, pregnancy options counseling, and related services—that petitioners seek to deny women. The availability of counseling and information about abortion services is critical to women's ability to protect their physical well-being and make decisions about their health care, based upon an understanding of the complete range of reproductive options.

The constitutional rights infringed by petitioners' conspiracy extend to all members of the class. All women of childbearing capacity may, at some time, require the types of services of the health care clinics that are blockaded by petitioners. Consequently, all women are targets of petitioners' conspiracy to deprive women of their equal rights under the law.[11] Petitioners' conspiracy

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[9] Alternatively respondents allege a class of "women who seek the services of providers of abortion and related services," which accurately identifies the women who are the direct and immediate victims of petitioners' conspiracy. As discussed below, the alternative class is essentially all women and is therefore, in relevant respects, indistinguishable from the class of women.

[10] Brief for Petitioners at 17.

[11] It is not relevant to the definition of the class that a small fraction of women—estimated at 8.4 per cent—may be infertile. *Research Refutes Perceived "Infertility Epidemic,"* Wash. Post, Dec. 7, 1990, at A-11 (citing W. Mosher & W. Pratt, *Fecundity and Fertility in the United States, 1965-88*, National Center for Health Statistics, Advance Data, No. 192 (Dec. 4, 1990)). On the con-

is not directed only at the particular women seeking access to a particular clinic on a given day, but is designed ultimately to stop all women who at any time may wish to exercise their right to travel to seek abortion services or information related to abortion and medical options during pregnancy.

That all members of a class are not presently seeking to exercise their rights is irrelevant. Although not all women are currently seeking employment in battery factories, a policy that discriminates in hiring for such jobs on the basis of women's childbearing capacity nonetheless discriminates against women as a class.[12] Similarly, the fact that not all African-Americans seek to exercise their right to decide to marry a person of another race, in no way detracts from this Court's holding that a racial classification, such as the classification in the Virginia statute challenged in *Loving v. Virginia*, violates the equal protection clause.[13] Therefore, notwithstanding the fact that not all women are pregnant at any given time, and not all women simultaneously seek the care of providers of abortions and related services, all women possess the right to travel to seek such services, and women as a class are the direct targets of petitioners' conspiracy to deprive them of that right.[14]

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trary, many women thought to be "infertile" seek medical treatment that includes extensive testing, monitoring, and counseling, and are ultimately able to conceive.

The fact that a small percentage of the members of the class may actually be irreversibly infertile does not undermine the existence of the class. This court in *Johnson Controls* recently recognized that a company policy that discriminated against women of childbearing capacity constituted discrimination on the basis of sex under Title VII. *International Union v. Johnson Controls*, 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991).

[12] *Johnson Controls*, 59 U.S.L.W. at 4212.

[13] *Loving v. Virginia*, 388 U.S. 1 (1967).

[14] The Solicitor General's extensive discussion of a footnote in *Geduldig v. Aiello*, 417 U.S. 484 (1974), is entirely irrelevant to

The vast majority of women become pregnant at least once during their lives. More than eight out of ten women will have at least one child by the end of their childbearing years,[15] and an estimated two-thirds of American women will have at least one unintended pregnancy in the course of their lives.[16] In any single year, more than six million women (eleven per cent of those of reproductive age) become pregnant, and 3.4 million of

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respondents' claim that petitioners' conspiracy is deliberately aimed at depriving women of their equal right to travel. Moreover, the issues presented in this case are of statutory, not constitutional, interpretation. In interpreting Title VII of the Civil Rights Act of 1964—another statute protecting women from sex discrimination—this Court recently held that an employment policy that excluded women of childbearing capacity from certain jobs was "a facial classification based on gender." *Johnson Controls*, 59 U.S.L.W., at 4211.

[15] U.S. Bureau of the Census, *Fertility of American Women: June 1988, Current Population Reports, Series P-20, No. 436*, at 17 (1988).

[16] Forrest, *Unintended Pregnancy Among American Women*, 19 Fam. Plan. Persps. 77 (Mar./Apr. 1987). According to a 1982 survey, 65 per cent of women between the ages of 40 and 44 have had at least one unintended pregnancy. *Id.* This extraordinarily high rate of unintended pregnancy is attributable primarily to the high failure rates of existing methods of contraception, the unavailability of certain contraceptives, and the lack of sex education. For example, during the first year of using the method, approximately one out of every seven women using a diaphragm or condom as a method of birth control will become pregnant; similarly, one out of sixteen women relying upon oral contraceptives will become pregnant. *See* Jones & Forrest, *Contraceptive Failure in the United States: Revised Estimates from the 1982 National Survey of Family Growth*, 21 Fam. Plan. Persps. 103, 109 (May/June 1989). Moreover, many existing methods of contraception present significant health risks that make them medically inappropriate for many women. Finally, abstinence and sterilization do not serve all women at all stages of their reproductive lives. Abstinence during the 40 or more years a women is fertile is not a viable way of life for most women, and sterilization, while effective, requires women to sacrifice childbearing permanently, rather than exercise their interest in procreative choice.

these are unintended pregnancies.[17] Each year 3.7 million American women give birth.[18]

Many women who had not previously considered having an abortion may at some point need information or counseling about abortion services and related testing and services. Many women experience health problems associated with their pregnancies. Of every ten women who become pregnant and bear a child, six are treated for some medical complication during pregnancy, and three are treated for major complications.[19] The onset or worsening of a disease or medical condition may create a need for a woman to consider having an abortion, even in cases in which the pregnancy was wanted and planned. Among the medical conditions that present increased risks to women's health during pregnancy—sometimes to the point of threatening the woman's life—are preeclampsia, cardiovascular disease, cancer (including cervical, ovarian and breast cancer), high blood pressure, kidney disease, immunological disorders, asthma, diabetes, systemic lupus erythematosus, and acquired immunodeficiency syndrome (AIDS).[20] Moreover, a woman contemplating becoming pregnant who suffers from one of these conditions may need medical care that includes counseling about the full range of reproductive options, including abortion, even before becoming pregnant.

Among the letters that *amici* have collected describing instances in which clinic blockades have interfered with

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[17] R. Gold, *Abortion and Women's Health* 11 (1990).

[18] Alan Guttmacher Institute, *Blessed Events and the Bottom Line: Financing Maternity Care in the United States* 5 (1987) (citing U.S. Bureau of the Census, *Fertility of American Women: June 1985, Current Population Reports, Series P-20, No. 406*, 8-9 (1986)).

[19] *Id.* at 10.

[20] F. G. Cunningham, P. MacDonald, N. Gant, *Williams Obstetrics*, 659, 796, 806, 813, 816-17, 836-37, 858, 859-61 (18th ed. 1989); N. Hunter, *Position Paper/Time Limits on Abortion*, in Reproduction Laws for the 1990s: A Briefing Handbook 110 (1988).

women's ability to exercise their rights, several recount compelling experiences that demonstrate that any woman may discover, in the course of a pregnancy, that she requires abortion services or counseling. One woman suffered from diabetes and risked losing her life if she did not terminate her pregnancy:

> [A] tearful woman and her husband . . . had been waiting in vain for the protestors to disperse. [The woman] was diabetic and had been advised by her doctor that an abortion was medically necessary. To carry the pregnancy to term would likely cost the woman her life, and she had made the decision to abort, thinking of her husband and three children. C27.

Several women sought abortions in cases involving severe fetal anomalies:

> The woman was carrying a fetus which, through amniocentesis, was determined to be without kidneys. Their doctor told them that the fetus probably would not survive delivery, but would definitely not be able to survive on its own. Because protestors were sitting in front of [the clinic] doors, [clinic staff members] pulled the couple over the protestors and through the doors. You could see the shock and despair, especially on the husbands [sic] face, who by now, was in tears. They told me that they wanted to have children, but under the circumstances, felt terminating the pregnancy at that point was the best thing. The people blocking the doors just made a very difficult experience even more traumatic. C26.
>
> We had to encircle a woman who was being harassed until she was sobbing uncontrollably. She explained to us that she was only getting an abortion because she had taken accutane which causes birth defects. There was also a laminaria patient who had to have her abortion completed that day or she could have had serious complications. C62.

The letters also recount the experiences of women who suffer from medical problems that require testing, moni-

toring and specialized prenatal care, and who may at some point require counseling from a physician who is able to address the full range of reproductive options, including abortion.

> I was having a lot of problems with hypoglycemia during my pregnancy with terrible headaches occurring when I didn't eat. . . . After going through not eating, drinking high-sucrose liquid, the beginnings of a migraine and no sleep (not to mention being 7 months pregnant) this confrontation brought me to tears. . . . We had made a Saturday appointment specifically to discuss some important issues with my doctor, but due to the circumstances [of a clinic blockade], it did not seem appropriate to bring these issues up at this time. He was visibly upset by this demonstration. This affected our doctor-patient relationship. After the test and my exam[,] my husband, girlfriend and I approached the back exit to leave. By this time there were lots of protesters outside. All three entrances were blocked by approximately 20 people each. I tried to open the door and they wouldn't move. They looked at us and started singing Christian hymns. . . . I just stood there amazed, I couldn't believe they were imprisoning us inside the building. . . . I was feeling fairly shaky and starting to be lightheaded by this point. The nurse offered me some tea, which I declined because I didn't want the caffeine, and I asked if they had any crackers. She got me some water and triscuits. I returned to the waiting room to wait and eat and try and deal with the anger I was feeling. I couldn't eat much because my stomach was so tied up in knots and the food was making me sick. My doctor was concerned about me and he offered to call an ambulance for me . . . . C12.

Women decide to have abortions for a wide array of compelling and complex reasons not only related to their physical health, but also based on their obligations to their families, their deeply personal religious and moral values, and their overall life situations and responsibili-

ties.[21] If current abortion rates continue, forty-six per cent of women currently of childbearing age will have had at least one abortion by age forty-five.[22] Each year approximately three percent of American women have abortions.[23]

Far from affecting only a small "sub-class"[24] of women, conspiracies to interfere with abortion services including counseling and information thus directly affect the rights of all women, including those who may never choose to have an abortion, as well as the many women who do seek abortions and related services.

II. PETITIONERS' ACTIONS ARE MOTIVATED BY A SEX-BASED ANIMUS DIRECTED AT WOMEN.

A. Sex-Based Animus Requires An Aim To Deprive Women Of The Equal Enjoyment Of Their Legal Rights.

As respondents persuasively argue, petitioners' conspiracy is driven by a "class-based, invidiously discriminatory animus" as required under section 1985(3). *Griffin*, 403 U.S. 88, 102 (1971). Petitioners and the

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[21] In addition, women who are the victims of rape and incest may choose to have abortions if they become pregnant as a result of these crimes. For a full discussion of the many reasons women may decide to have abortions, illustrated in excerpts from the letters of individual women recounting their personal experiences with abortion, *see* Brief for the *Amici Curiae* Women Who Have Had Abortions and Friends of *Amici Curiae* in Support of Appellees, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605).

[22] Forrest, *Unintended Pregnancy Among American Women*, 19 Fam. Plan. Persps. 77 (Mar./Apr. 1987).

[23] In 1987, the United States abortion rate was 27 abortions for every 1000 women of childbearing age. Henshaw, Koonin & Smith, *Characteristics of U.S. Women Having Abortions, 1987*, 23 Fam. Plan. Persps. 75, 76 (Mar./Apr. 1991).

[24] Brief for Petitioners at 17.

United States as *amicus curiae* in support of petitioners misstate the animus requirement when they argue that Operation Rescue is not motivated by "hostility toward women," [25] or "animosity toward women." [26] No such "hostility" or "animosity" is required, nor is support for such a requirement cited by either petitioners or the United States. To the contrary, this Court emphasized that the requirement of animus is a requirement of "motivation" and that the conspiracy "must aim at a deprivation of rights secured by the law to all." [27] The aim of petitioners' conspiracy is to deprive women of their "rights secured by the law to all," including their right to travel to obtain necessary and protected health care, by physically barring women's movement.

Respondents' comparison of the conspiracy alleged in this case to the conspiracy alleged in *Griffin*, and deemed sufficient by this Court to satisfy the animus requirement, is compelling. In *Griffin*, as here, the purpose of the conspiracy "'was to prevent [the] plaintiffs . . . through . . . force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the [states].'" 403 U.S. at 103. The Court concluded that "[t]hese allegations clearly support the requisite animus to deprive the petitioners of the equal enjoyment of legal rights because of their race." *Id.* In this case, petitioners' goal is to prevent women, and only women, from

[25] Brief for Petitioners at 20.

[26] Brief for the United States as *Amicus Curiae* at 14.

[27] This Court specifically limited the meaning of the "animus" requirement for the purposes of this statute to "invidiously discriminatory animus," and not "scienter in relation to deprivation of rights." The "animus" requirement does not incorporate a requirement of "willfulness," and "must not be confused with the test of 'specific intent to deprive a person of a federal right made definite by decision or other rule of law.'" *Griffin v. Breckenridge*, 403 U.S. at 102 n.10.

freely exercising their rights under current law. Thus, petitioners' conspiracy is based upon the requisite class-based discriminatory animus under the statute.

B. The Activities In Which Operation Rescue Engages Demonstrate That The Conspiracy Is Aimed At Depriving Women Of Their Rights.

Petitioners erroneously assert that the question presented in this case is whether "opposition to abortion, standing alone, . . . translate[s] into sex discrimination." [28] Neither respondents nor the lower courts have suggested that opposition to abortion, without more, constitutes discrimination against women. Petitioners' mischaracterization ignores a fundamental distinction between the physical blockades in which petitioners engage and "opposition to abortion, standing alone." Petitioners possess and act on the requisite class-based animus because they purposefully engage in concerted, mob action to prevent women from exercising their legal rights.

That petitioners' aim is to prevent women from equally exercising their legal rights is vividly conveyed in the voices of individuals who have related their personal experiences at clinic blockades in letters collected by *amici curiae*. These letters describe the various actions clinic blockaders undertake in their efforts to prevent women from obtaining medical care. Petitioners, unlike many people who oppose keeping abortion legal and who seek to change the law through legislation, litigation, and other forms of social and political activism, are motivated by a determination to deprive women of their rights under existing law through any means available including physical confrontation, terrorism, violence and trespass. One clinic volunteer described the terrorist tactics used by the blockaders:

> The windows in the clinic have been shot out three different times during the night and it is also frightening to arrive in the morning to find windows shat-

[28] Brief for Petitioners at 19.

> tered by bullets and bullets lodged in the walls. . . . [T]he building has been covered with red paint, eggs have been thrown all over the building and the parking lot. C29.

Petitioners' blockades are not, and are not intended to be, peaceful attempts to "persuade," "discourage," and "dissuade" women from having abortions.[29] Rather, petitioners' clear motivation is to deprive women of the opportunity to exercise their rights and enjoy the equal protection of the laws, by physically impeding women's freedom of movement. In the words of one clinic employee, the protesters will "stop at nothing to prevent women from exercising their legal rights." C22. Far from engaging in peaceful sit-ins, demonstrations or other acts of persuasion, petitioners frequently resort to unlawful means— including "force, intimidation and violence" [30]—to exert control over women's reproductive decisions.

A tactic employed in virtually every clinic blockade is for the blockaders to form a barricade in front of the doors to the clinic so that women cannot enter or leave.

> At 7:30 A.M., approximately 350 people came marching toward my building in block formation, about twelve abreast. I met them at the property boundary with two private security guards and said what the police had instructed me to say. What a joke—not a funny one either. The mob pushed me all the way to the front door of the clinic and proceeded to

[29] Brief for Petitioners at 20; Brief for the United States as *Amicus Curiae* at 14. Both petitioners and the United States place misleading and unwarranted emphasis on the facts recited in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989). Unlike the conspiracy that is the subject of this litigation, the allegations in *Mississippi Women's Medical Clinic* involved only picketing and attempts at persuasion. Here, by contrast, the petitioners' purpose is to interfere with women's exercise of their rights through intimidation and physical obstruction of their freedom of movement.

[30] *Griffin*, 403 U.S. at 103.

> pin me and the guards against the brick wall and door. There were thirteen female employees now trapped in the building. More of the group went and blocked the two back doors. C33.

Another letter described how the blockades extend to the sidewalks around the clinic and into the streets to interfere with traffic.

> Ingress and egress to the clinic is often impeded by protesters physically blocking the sidewalk or driveway. The most frequent targets for these actions are women walking or driving alone. I have seen protesters place themselves prone in the drive or public street in front of moving cars forcing the drivers to stop. C47.

The force and physical obstructions are not limited to the clinic entrances and surrounding sidewalks. Blockaders often try to shove through the doors in order to invade and occupy the clinic, recognizing that once they break through the doors, they can more effectively put a halt to the provision of medical services. At a clinic in Vermont, patients and staff were held hostage for hours inside waiting and examination rooms before the police could remove "the intruders who had bicycle locked their necks together."

> Once the locked door was open, 39 men and 13 women charged out of a moving van and stormed into the [Women's Health Center], knocking me to the waiting room floor. While I was trying to reach the telephone, a man bodily trapped me while I watched hordes of people invade the building. I feared for the safety of the staff. I envisioned the damage and destruction to our property. . . . A patient was trapped in the counseling room adjoining the occupied hallway. She had come to the Health center that day for further screening of an abnormal pap smear to determine if she had cervical cancer. Staff was unable to reach her. She was alerted through the intercom that the building had been invaded and that the police were on their way. . . . It

took 6 hours to remove the intruders who had bicycle locked their necks together. As [ ] police attempted to remove these people, they struggled. Two policemen were injured in the process. Others were called Nazis. . . . Over the long hours of that afternoon I personally endured vicious name[-]calling and was subjected to their hateful behavior. A man calling himself Father Baby John Doe kicked me. I felt violated and assaulted . . . . C5.

As [the assistant director of the clinic] opened the heavy, steel firedoor, I heard her scream. Seven protesters had thrown their full body weight against the door to prevent the doctor's entrance. In the process, they had pinned the assistant director in the door and she was being crushed by the combined weight of the door and the people pressing against it. I wedged myself between her and the door in an effort to gain some leverage and relieve the pressure on her. She was freed, the door was opened a bit more and the protesters grabbed my ankle and pulled me to the ground. I landed on my knee and twisted it badly. I was half in and half out of the building, and I was crying and begging them to let go of me because I was injured. . . . Nobody moved, despite the fact that I was obviously hurt. C40.

In addition to physical obstruction, blockaders use fear tactics and emotional coercion to terrify women out of exercising their legal rights. In the words of one victim, in order to bar access to medical facilities that provide abortion services, they "bully and intimidate women from utilizing clinic services." C14. One person remarked, "[H]aving to fight your way through people trying to block your access to health care is not only a draining ordeal physically, but emotionally, as well." C44. And as one employee in a doctor's office explained, "I can't count the number of times I've seen a patient came [sic] in crying, near hysteria, totally initimidated [sic] by the OR [Operation Rescue] picketers." C4.

In their effort to interfere with women's ability to exercise their rights through provoking fear and anxiety,

blockaders often focus their verbal harassment specifically at women seeking to enter the clinics. One such tactic is to bombard the woman with a series of very intrusive and personal questions.

> Physical intimidation and verbal assault are the primary tools employed against women by anti-abortion groups. They refrain from accosting men on public streets to demand personal information on pregnancy status, marital status, religion, or his sex life. Instead they assail women. . . . The privacy and dignity of women is completely disregarded with every clinic blockade. That this kind of behavior is condoned is unacceptable; that women specifically must bear the rage and contempt of Operation Rescue should no longer be endured. C14.

Decisions about pregnancy, abortion, and childbearing are intensely personal, and the threat of exposure is terrifying to many women. Tactics that play on the fears of women seeking medical care at the clinics are not unusual. One escort remarked that a blockader "writes down the license tag numbers from all the cars parked in the clinic parking lot. Some of the clients who come from small towns are intimidated by this." C33. One escort tells of a woman who "demanded that a client parking in the clinic lot produce some identification. The client told us later she had no idea who [the protestor] was, but assumed she was someone in authority[. W]hen an escort came up to the car and the protester retreated the client was still fumbling in her wallet and said 'Here's the I.D. that woman wanted.'" C37.

One of the most invidious tactics has been the use of photography and videocameras to invade the privacy of women entering the clinics and to intimidate them out of exercising their rights. One volunteer clinic escort recounts that "one of [the blockaders] usually has a camcorder and videotapes patients. This is one of the most intrusive and upsetting things I have seen so far. The patients are afraid that they will see themselves on television, maybe on the evening news!" C62.

> [Clinic blockaders] photograph[] each patient as she goes in the abortion clinic. I actually saw one protestor continue to photograph two women even after the women had told him to NOT take their picture. . . . the protestor, after being told to not take the ladies[']picture, smirked as he continued to take snapshots. C2.

In at least one case, the result of the photographic record was tragic:

> I have observed anti-abortion picketers photographing all people who enter clinics. I know of one particular instance in which an anti recorded the license plate number, got the name of the owner, and called to preach on the evils of abortion. Sadly, the person who owned the car was the mother of a woman who had not confided her pregnancy to her family. . . . [This event] temporarily destroyed the relationship between mother and daughter. The daughter had been impregnated by the mother's boyfriend . . . [who] had taken advantage of her when she arrived home in a drunken state. C3.

In their attempts to obstruct women from entering clinics, the blockaders will torment even small children. In one incident,

> [The clinic blockaders] showed no respect even for very small children. A mother with her two children were simply walking by the clinic and came up to find out what was going on when the O.R. [Operation Rescue] people shouted at the woman and showed bloody pictures to her children who were horrified. C9.

In another episode, "[o]ne man yelled at a black woman, 'You bitch . . . they're going to kill your little black baby.' If a woman has a child with her, they will say, 'What a beautiful baby. Do you want to kill this one too?'" C1.

One clinic escort described an experience in which,

> [A] woman in the company of her two children approached the clinic. They were met by a frenzy of hostile picketers who shoved at them photographs of what they claimed were aborted fetuses and screamed at the mother, 'Don't kill your baby!' The fact that the woman was there to see the children's dentist did not phase the picketers and they continued to harass and block her entrance to the clinic. . . . [O]nce inside, the children were hysterical, crying out, 'Mommy, don't kill us!' C8.

In addition to verbal harassment, threats of physical violence play an important role in the methods used by petitioners and other blockaders to intimidate women and to frustrate the efforts of others, such as clinic staff and escorts, seeking to preserve women's rights. One woman who volunteers as a clinic escort stated that "[o]n four occasions I have been physically threatened. . . . [One man] walked back and forth in front of the Atlanta Surgi Center with a big sign on a heavy wooden handle. He shoved me repeatedly and said, 'Stay away from me or you could fall and really get hurt' and 'You could have a bad accident.' C37.

In another incident in which physical violence was threatened,

> A man in his late 50's or early 60's, about 6'1" or 6'2" . . . approached me and stood very, very close to me. . . . He continued to breathe heavily, as though he were barely restraining himself from hitting me . . . . He said, 'You had better get out of here, miss.' I was scared, but I knew he was trying to scare me into leaving, so I kept standing there, looking into the crowd. He said again, 'I'm warning you, miss. Leave now.' I did not. He then took one of the wooden stakes, which seemed, from my peripheral vision, to be about a foot long made from rough lumber with a point at the end and a metal sheet in the middle, out of his bundle and into his free hand. It was trembling. He brought it up to my left eye, a little to the left of the center of my eye, and about

> 2 or 3 inches away from my face. He began to twist the stake slowly from side to side, not saying anything, but breathing heavily. Then he said, 'Get out of here!' and he jabbed the stake toward my eye on each syllable. . . . It was the first time in my life that I had been physically threatened. He was taking advantage of the fact that he was a foot taller than I, at least 100 lbs. heavier, and, for all practical purposes, armed. . . . I put myself at tremendous risk of assault. . . . C16.

At an Operation Rescue action in New York, a blockader

> ran to the side of the drive and picked up a jagged rock. He came back and stood at my side of the car and tapped the rock against the windshield. He kept threatening us, saying no one else was around. I was too scared to look around to see if he were telling the truth, but I grabbed my camera and got pictures of him holding the rock. I rolled down the window so I could hear what was going on outside and I heard him say he was going to kill us if we did not move. I was terrified because not only was the rock about 8 inches from my face on the windshield, but one of the WACDTF [Washington Area Clinic Defense Task Force] members had recently been hospitalized after an OR [Operation Rescue] member attacked her with a flashlight in an abandoned parking lot. I grabbed a jacket to shield myself from the glass if it shattered . . . . C16.

In another incident, a blockader threatened to run over a pregnant woman who was working as a clinic escort.

> I was standing in front of [his] van. . . . As the van approached me, in a panic, I pushed back against it. A nearby police officer ordered [him] to stop. Continuing forward, [he] screamed, 'No we have to go rescue babies.' . . . The police officer then slammed his hand on the top of the van and again ordered [him] to stop. This time [he] did stop. I was pregnant at the time this took place. This caused me to have some early pregnancy spotting. C13.

The tactics used by petitioners and similar organizations are extreme. In order to deprive women of their legal rights, clinic blockaders frequently move beyond their verbal threats and resort to physical violence. One clinic director described an experience in which,

> The mob pushed me all the way to the front door . . . and proceeded to pin me and the guards against the brick wall and door. . . . These people were physically rough and abusive . . . . They hit us, they bit us, they pushed and shoved us. I was elbowed so many times I thought I would faint. . . . For three and a half hours I was against that brick wall and door while the Operation Rescue people held bibles up to hide their friends' faces on the bottom of the pile that were pinching, hitting, and biting us. C33.

Women seeking to exercise their legal rights and their supporters have sustained serious injuries at the hands of the blockaders. A clinic escort, who identified the attacker, 'Ed', as one of petitioner Randall Terry's bodyguards, wrote that,

> 'Ed,' . . . rush[ed] my partner, picking her up, and slamming her against the brick wall of the hotel. She got up off the ground, whereupon, 'Ed' rushed her again, forcing her to the ground, kicking her in the stomach, back, face and breasts. 'Ed' then pulled out his metal flashlight and began clubbing my partner on the head and neck with the instrument. During this time, my partner had curled up in a ball, attempting to protect her head and body. . . . 'Ed' was screaming at my partner that he was 'going to kill her,' calling her a 'murderous bitch', 'cunt', 'whore' and 'slut'. C43.

In another violent incident,

> [S]ix men rushed around the corner, knocking me into a wall, a desk, and I finally landed on the floor. The invaders made their way to the patient waiting room where they used kryptonite locks to chain themselves together. . . . [I have made] nu-

merous trips to doctors and under[gone] physical therapy for three months for injuries sustained in their assault. . . . C22.

Another clinic escort described how,

> They [clinic blockaders] began pressing against us and somehow one of the clinic defenders fell or was pushed into one of the panes of plate glass and it shattered. . . . I felt numerous times that the physical pressure would do some damage to my body. I was also very afraid, as I think we all were, that if the OR [Operation Rescue] people kept pushing us against the doors, another pane of glass might give. And the most disturbing and frightening thing about it was that when confronted with the prospect that we might get hurt, most of the OR [Operation Rescue] people didn't seem to care. C34

In the course of employing these intimidating and violent tactics, the clinic blockaders display an utter disregard for the dangerous effects their actions have on women's health. The blockades cause more than a deprivation of legal rights, they endanger the health of women seeking critical medical care.

> Two women were there for the second day of a two-day surgical abortion procedure, in which a delay of the second days' surgery (following an injection given the day before) can threaten the patient's reproductive system and her life. . . . [No other clinic in the area performs such procedures.] This was not something that concerned the 'pro-life' people in the least, however. They descended on the van [in which the two women were waiting] like locusts and screamed every epithet in the book, calling the women murderers, raving about blood and bones and death, and waving grotesque photographs. The women were in tears. . . . The women were trapped in the van. . . . [They] were not able to return to the clinic until 7 p.m. that evening. Fortunately no serious complications resulted, but not only were they intimidated, threatened, and verbally

> abused by "Operation Rescue," their lives and health were put in danger. C1.
>
> The [clinic blockaders] demonstrated their disregard of women's health and well-being. This becomes evident when they shout to a woman . . . 'You should die, not your baby.' These are individuals who disrespect the integrity of a woman's conscience and care little about her life or her family's life. C5.

In some cases, according to a clinic escort, "women had to wait lengthy periods after entering clinics, in order for their blood pressure to return to normal levels, so that medical procedures would not be unduly risky." C44.

The behavior of clinic blockaders is so frightening and intimidating that women are forced to take actions that endanger their health and lives in order to escape from the blockaders.

> Another anti-choice protestor who is a large man, runs up the street at women. These women are so startled by a strange man running at them, that several of them have darted into the street to try and avoid him. They run into the street without looking for oncoming traffic. This has led to close calls and the anti-choice activist has endangered the welfare of citizens by his aggressive actions. C39.

Petitioners have been so effective in their tactics of intimidation that in many areas, the local police have been either unable or unwilling to stop blockaders from depriving women of their rights. For example, in a town in Georgia,

> The protesters have successfully intimidated the Mayor of this small city located within the metropolitan Atlanta area and the Police Chief as well. It is seldom that we have any significant action by the Mayor, the Police or the County law enforcement officials in regards to their criminal activities. C66.

Frequently, the police are not only unhelpful, but also display a callous and offensive disregard for the rights of the women seeking their assistance.

> One of the policemen told me that they didn't want to take sides. When I said that I assumed that he would be on the side of the law, he just shrugged his shoulders. . . . One lieutenant said they should be out chasing 'real criminals like rapists who are supposedly a cause of all these abortions.' C62.

Among the letters that describe the refusal of local police to provide assistance were the following:

> I approached one of the policemen that were at the building and told him that these people were interfering with my right to see my doctor. He told me he couldn't do anything because it could cause a riot. C48.

> On May 3, 1987, approximately 80 anti-abortionists in teams of 20 per group physically blocked the driveways and streets to the surgical clinic. The police were aware that this activity would take place but made no effort to stop the criminal trespassing. C66.

In some cases the police simply stand by while clinic blockaders engage in violent activities.

> In the spring of 1990 Women's Health Services had over two hundred protesters in front of the high rise office building where they are located. The escorts had formed a protective wedge around the patient and her friend. As we approached the entrance of the building the crowd of anti-abortion protesters swelled. They screamed at the patient calling her a murderer and they told her the abortion would give her brain damage, we pushed on. An escort to the left of the patient had his knee kicked out from underneath him, he fell to the ground. . . . Suddenly an older women pushed a small child in front of my legs. I had over 30 people pushing from behind and somehow I managed to not step on this child who surely would be crushed by the throng of people. I

> placed my hand on the child's shoulder and pushed her to the side as quickly and gently as I could. The police stood by and watched as we approached with a look of astonishment but they did nothing. C54.

The activity in which petitioners engage is precisely the kind of politically motivated mob violence designed to prevent persons from exercising their rights to which section 1985(3) was intended to apply. Because petitioners' conspiracy involves the use of physical force, intimidation and violence to prevent a protected class from exercising their protected rights, this case does not require, as petitioners suggest, this Court to interpret 42 U.S.C. § 1985(3) to be a federal remedy "for all tortious conspiratorial interferences with the rights of others." *Griffin v. Breckenridge*, 403 U.S. at 101. Indeed, the activity enjoined in this case, like the activity in *Griffin*, is "so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." 403 U.S. at 103. The "terrorist" behavior of petitioners is remarkably similar to the conspiracy of violence and intimidation carried out by the Ku Klux Klan against which Congress intended this statute to protect.

> About 15 members of the crowd began to chase after us, yelling, 'Stop!' . . . It hit us that we were being chased by an angry mob. Both of us are civil rights history buffs and at that moment we understood what it felt like to be a black voter in Mississippi in the 1950's. There was just no telling where the mob would draw the line. They had attempted to blockade us in the house, lain in wait for us to try to get out, screamed epithets at us, shoved us backward into the crowd, away from the street, and run after us with signs and pictures. C16.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

THE NATIONAL ABORTION RIGHTS ACTION LEAGUE FOUNDATION (THE NARAL FOUNDATION), and its affiliated organizations, the National Abortion Rights Action League and 41 state organizations, have approximately 500,000 members nationwide. The NARAL Foundation is dedicated to public education and legal efforts to protect women's reproductive rights, including protecting women's access to abortion and related services. The NARAL Foundation recognizes that guaranteeing women the full range of reproductive choices is critical to women's health, autonomy and equality.

ABORTION RIGHTS COUNCIL OF MINNESOTA does not seek to prohibit persons from peaceably assembling and protesting. However, we strongly object to any attempt to threaten the safety or hamper the safe passage of clinic patients as they attempt to procure legal medical treatment. In Saint Paul, Minnesota, last June, an illegal blockade cost city taxpayers over $5,000 in wages, equipment, and compensation to a police officer who was injured by protesters. We hope that the Court will condemn such violent, terroristic acts.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW), a network of 135,000 college-educated women, promotes equity for women and girls, education and self-development over the life-span and positive societal change. The AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care and believes access to legal abortion should be guaranteed to all women and girls. AAUW believes that decisions concerning reproductive health care are personal ones, and that the right to make informed decisions should be available to all women.

AMERICAN MEDICAL WOMEN'S ASSOCIATION, INC. (AMWA) is a nonprofit organization of 12,000

women physicians and medical students. One of AMWA's primary missions is to promote quality health care for women. AMWA strongly supports laws which protect the health of women, particularly the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

B'NAI B'RITH WOMEN is an organization of 100,000 Jewish women dedicated to uniting Jewish women. Since 1968, the organization has held that women should have the right to choose for themselves on matters of reproduction. The organization has reaffirmed that right many times by reiterating its opposition to any legislation that restricts a woman's freedom to choose whether, when or if to bear children.

CALIFORNIA WOMEN LAWYERS is an organization founded in 1973 for the primary purpose of improving the situation of women in the State of California. CWL is the largest women lawyers organization in the world, with several thousand individual members, and speaking for 30 women's bar organizations in California. From its inception, CWL's agenda has included increasing the numbers of women appointed to the bench, admitted to law schools, offered jobs and partnerships in law firms, and eliminating gender bias in the courts. It has also been committed to all issues affecting a woman's right to choice, lobbying against various parental consent bills and working with a broad-based coalition to encourage funding and support for programs supportive of choice.

CATHOLICS FOR A FREE CHOICE is an independent national organization established in 1973. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S.

Constitution but also on the Roman Catholic Declaration on Religious Liberty (Vatican II Dignitatis Humanae, 7 December 1965) which declares ". . . the civil authority must see to it that the equality of the citizens before the law, which is itself society, is never violated, either openly or covertly, for religious reasons and that there is no discrimination among its citizens."

CENTER FOR WOMEN POLICY STUDIES brings policy recommendations on the "second generation" of complex reproductive rights/health issues to state legislators, state and local judges, and advocates for choice and women's rights; focuses on legal and ethical issues surrounding the new reproductive technologies and on the effort to define a legal status for the fetus, in the context of women's equality and reproductive autonomy; produces Resource Collections and Policy Briefs, including the first Resource Collection, *The Law and Pregnancy: Protection or Punishment;* works with key organizations, including the Women's Legislative Network of the National Conference of State Legislatures, to reach policymakers; continues the Reproductive Laws for the 1990s Project, which began in 1985 under the aegis of the Women's Rights Litigation Clinic and the Institute for Research on Women at Rutgers University.

COALITION OF LABOR UNION WOMEN (CLUW) is America's only national organization for union women, with 75 chapters across the country and members from more than 60 unions. CLUW pursues the goals of the labor movement, fighting for decent wages and working conditions and a stronger voice for working people in society. CLUW strives to make organized labor and the public in general more sensitive to the needs of working women. By convention resolution, CLUW supports the right of every woman to make reproductive choices free from government interference and supports access to a full range of health care and family planning serices, without restrictions.

EQUAL RIGHTS ADVOCATES, INC. (ERA) is a San Franciso-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law that affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society.

FEMINIST MAJORITY FOUNDATION is a national educational and research organization which works for women's equality and reproductive freedom and against sex discrimination. The Feminist Majority Foundation runs the Clinic Defense Project in Los Angeles, California to protect the right of women to seek unimpeded health care at clinics.

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., founded in 1973, is the nation's oldest and largest national legal advocacy organization working in furtherance of the rights of lesbians and gay men. As an organization representing the lesbian and gay community's belief in the constitutional right to liberty and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion.

The purpose of the **MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION** is to promote and enhance the social, economic, political and educational advancement of Hispanic women.

NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN is an organization which seeks to eliminate all forms of discrimination. We believe that all persons have the right to make their own choices about medical care and procedures and should have access to such care without being subject to harmful intimidation and harassment.

THE NATIONAL BLACK WOMEN'S HEALTH PROJECT (NBWHP) is a self-help, health education and advocacy organization which works to improve the health status and quality of life for African American women and their families. It consists of 150 developing and established chapters in 25 states serving a broad constituency of approximately 2,000 members. The NBWHP is deeply concerned about barriers that impede or prevent access to quality health services, including abortion. The already poor health status of low income African American women, due in part to lack of access to health care, is further exacerbated by the hostility, intimidation, and harm caused by clinic blockades. The NBWHP joins this brief to voice its opposition to the violent and harmful actions and tactics of Operation Rescue which prevents African American women from exercising their right.

NATIONAL COUNCIL OF JEWISH WOMEN (NCJW), founded in 1893, is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 200 Sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's concern for individual rights and our National Resolutions which include working for "the protection of every female's right to choose abortion, and the elimination of obstacles that limit reproductive freedom," we join this brief.

The **NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC. (BPW/USA)** is a membership organization of working women with a mission to promote "full participation, equity and economic self-sufficiency for working women."

NATIONAL INSTITUTE FOR WOMEN OF COLOR advocates the right of women of color to exercise freedom of choice in decisions relating to our reproductive health needs. This includes the decision to seek an abortion.

Public clinics serve a large portion of low-income women and women of color are disproportionately represented in this group. Therefore, it is imperative that access to services provided by the clinics not be denied to women of color, curtailing our rights of choice and access to health care.

NATIONAL WOMEN'S CONFERENCE COMMITTEE serves as the only body currently constituted under Public Law 94-167 to monitor and implement the 1977 National Plan of Action for Women. We work with the Council of Presidents nationally and with 30 statewide networks to address issues in that plan, approved by a democratically representative group from every state and territory; item #21, "Reproductive Freedom" states, "We support the US Supreme Court decisions which guarantee reproductive freedom to women. We urge all branches of Federal, State, and local governments to give the highest priority to complying with these Supreme Court decisions and to make available all methods of family planning to women. . ."

NATIONAL WOMEN'S HEALTH NETWORK is a nonprofit advocacy group concerned with the status of women's health. Our membership is composed of 11,000 individuals, many of whom could be directly, and adversely, affected by the lack of free access to reproductive health facilities.

NATIONAL WOMEN'S PARTY includes freedom of reproductive choice as an issue on its agenda.

NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC) is a nonprofit organization supporting the appointment and election of women to public office. NWPC also supports legislative initiatives at the state and national levels to insure fairness and equity for all Americans.

NORTHWEST WOMEN'S LAW CENTER is a nonprofit, membership organization in Seattle, Washington, that works to advance legal rights for women through

litigation, legislation, education and providing free legal information and referrals. The Law Center has done extensive work in the area of reproductive rights, including litigation against Operation Rescue in which the Law Center obtained a permanent injunction against blockaders in Washington State. That case is now on appeal to the Ninth Circuit Court of Appeals.

VOTERS FOR CHOICE is an independent and bi-partisan political action committee. In order to preserve safe, legal and accessible abortion services for all women, regardless of geographic location, age or economic status, Voters For Choice works to elect pro-choice candidates to federal and state public offices.

The **WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM (WILPF)** has been working since 1915 to unite women to oppose war, exploitation and oppression. WILPF stands for equality of all people in a world free of racism and sexism; building a constructive world through peace and disarmament; and changing government priorities to meet human needs.

WIDER OPPORTUNITIES FOR WOMEN has worked nationally and in Washington, DC, for twenty-seven years to achieve economic independence and equality of opportunity for women and girls. WOW has a solid track record of achieving advances for women in economic policies, employment practices and employment training programs. As an organization committed to improving the economic status of women, WOW is deeply concerned that women's reproductive rights be protected, as well as their health and well-being.

WOMEN'S MEDICAL FUND, INC. has assisted thousands of indigent and needy women to obtain abortion care through its volunteer charity, a tax-exempt fund. Some of the women we have helped, like U.S. women everywhere, have experienced violence, harassment, taunts, indignities and needless trauma in their effort to exercise their legal and moral right to choose abortion.

The **YALE JOURNAL OF LAW AND FEMINISM** is committed to publishing pieces about women's experiences, especially as they have been structured, affected, controlled, discussed, and ignored by the law. These experiences include the particular experiences of women of color and lesbians; they include rape, battery, sexual abuse and harassment, reproductive slavery, isolation, powerlessness, and oppression; and they include experiences of sexual and reproductive agency, community, power, and freedom. Too often, people have neither believed accounts of nor printed pieces about these experiences. The Journal prints them because it seeks to provide a forum for voices too seldom—perhaps never—heard.

ZERO POPULATION GROWTH is a national, nonprofit organization with 35,000 members. Founded in 1968, it is working to achieve a sustainable balance between the earth's population, environment and resources. The organization supports voluntary efforts to stabilize population growth through education and advocacy programs.

APPENDIX B

LETTERS FROM WOMEN AND THEIR SUPPORTERS WHO HAVE EXPERIENCED THE USE OF FORCE, VIOLENCE, AND INTIMIDATION IN ATTEMPTS TO PREVENT WOMEN FROM EXERCISING THEIR RIGHT TO TRAVEL AND OBTAINING THE SERVICES OF MEDICAL FACILITIES THAT PERFORM ABORTIONS.

The texts set forth herein are the complete transcriptions of the letters quoted in part in the brief of *Amici Curiae*.[1] Additional letters are lodged with the court.

LETTER—C1

My name is [ ]. As a member of the Washington Area Clinic defense Task Force, I have been a clinic escort at area abortion clinics experiencing harassment by Operation "Rescue" for nearly two years. During this time, I have witnessed numerous incidences of extremely intimidating behavior, and in some cases violence, by "rescuers" at various clinics.

One particularly awful experience was an attack by OR and affiliated groups on Hillview Clinic in Suitland, Maryland, on November 18, 1989. One antiabortion protester smashed through a plate-glass window in the front of the building in an early attempt to get inside the clinic to blockade and/or vandalize it. Nearly 800 members of Operation "Rescue" descended on the clinic, and pro-choice volunteers were unable for quite some time to get patients into the clinic.

Two patients were waiting in a "safe van" provided by pro-choice people. These two women were there for the second day of a two-day surgical abortion procedure, in which a delay of the second day's surgery (following an injection given the day before) can threaten the pa-

[1] The texts of these letters are reproduced as originally written, maintaining any errors in punctuation, spelling, or grammar.

tient's reproductive system and her life. Hillview clinic is the only clinic facility in the Washington area which performs such procedures, and these women could not affiord the cost of a hospital procedure.

This was not something which concerned the "pro-life" people in the least, however. They descended on the van like locusts and screamed every epithet in the book, calling the women murderers, raving about blood and bones and death, and waving grotesque photographs. The women were in tears. A circle of pro-choice people formed around the van to keep the antis away from the women, and we were forced to stand there, arms linked, for over three hours. The women were trapped in the van.

When it became apparent that things would not clear out for some time, the women in the van were taken elsewhere to wait and decide what they wanted to do. As the van attempted to pull out of the parking lot, OR members once again swarmed in from of it and on top of it, jumping in front of the van, and holding signs in front of the driver's windshield, making driving extremely dangerous.

The women in the van were not able to return to the clinic until 7 p.m. that evening. Fortunately, no serious complications resulted, but not only were they intimidated, threatened, and verbally abused by Operation "Rescue," their lives and health were put in danger.

I was also an escort during an Operation "Rescue" attack on Richmond Medical Center for Women in Richmond, Virginia, in April of 1990. At one point, an OR "sidewalk counselor" began to chase a patient through the residential streets as she attempted to make her way to the clinic. The patient was literally running at top speed and pleading with the OR member to leave her alone, but the "counselor" continued the chase. Two other clinic escorts reached the woman, who grabbed onto their arms and ran with them to the clinic.

There was yet another assault on D.C. area clinics on November 1991. Capital Women's Center, at 22nd & O Streets N.W. in Washington, was blockaded by OR on the final day of the hits. Several neighborhood residents volunteered their house so that patients could wait in privacy and safety while the police arrested OR members and cleared the area.

Unfortunately, OR people figured out where the safe house was and began to surround it, trying to climb up on the porch, peer inside, trying to open the windows (the door was locked) and so forth. Pro-choice volunteers were once again forced to form a human wall in front of the house to protect the patients. When the patients were escorted out by pro-choice volunteers and police, the antis tried to chase after them, grabbed at them, and screamed at them.

I have heard all sorts of horrible things shouted by Operation "Rescue" members at women who are going into clinics. One man yelled at a black woman, "You bitch . . . they're going to kill your little black baby." They call women murderers, tell them they're possessed by Satan and are going to hell. If a woman has a child with her, they will say, "What a beautiful baby. Do you want to kill this one too?"

Patients, clinic staff, and clinic directors have been followed home by Operation "Rescue" and harassed in their neighborhoods and by phone. O.R. claims to want to help women, but anyone who has seen them in action knows that is a lie. They are abusive, intimidating, and cruel to women.

• • •

LETTER—C2

My encounters with anti-choice protestors began the weekend after the April 9, 1989 pro-choice march in Washington, D.C. I and other members of N.O.W. became "escorts" at an abortion clinic, Women's Com-

munity Health Center, at the request of the staff. The way the clinic was situated, the protestors could stand right in front of their door and annoy the patients. We, more or less, acted as a buffer between the patients and the protestors. We continued this service for a little over a year until the clinic moved to a location where, although the protestors are still there, it was not practical for us to be there. Believe it or not, the doctor next door (an OB/GYN physician by the name of [ ]) allows the anti-choice protestors to stand in his parking lot which adjoins the abortion clinic, and harass the patients of Dr. [ ], the abortion provider.

Fortunately we have not had "operation rescue" type of problems here—yet. What I have witnessed, besides the usual "preaching" about Jesus and pleading with the patients to not murder their babies, spreading lies and showing little plastic models of babies and bringing little babies of all colors to the clinic for the patients to view as they go in the door, is the protestors photographing each patient as she goes in the abortion clinic. I actually saw one protestor continue to photograph two women even after the women had hold him to NOT take their picture. As a matter of fact the protestor, after being told to not take the ladies picture, smirked as he continued to take snapshots.

Of course, the protestors took our pictures and would even try to sneak a recorder in their pocket and get close to us to record what we were saying. Whenever we have an event, the anti-choice people manage to take our pictures and record what we say—all of which is okey with us.

It might also interest you to know that there was an office next door to the clinic (provided free by the owner of the building or very cheap) occupied by a so-called crisis pregnancy center. Patients of the clinic were often enticed in to this office for free pregnancy tests and anti-abortion movies and literature. Many times the patients

did not immediately that they were not in the abortion clinic.

I must ask: if our opposition's cause is so righteous, why do they have to lies and harassment?

• • • •

LETTER—C3

I have had numerous experiences with anti-abortion activities as an activist, a patient and as the Executive Director of an abortion facility. On one occasion I even went into a "fake clinic" to affirm all I had heard about their terroristic treatment of women seeking abortion.

In [ ], in recent years, the anti-abortion folks have limited their activities to photographing women entering clinics, recording license plate numbers, hate mail, the display of late term fetuses in clinic driveways and, of course, deceiving women into coming to their offices which advertise under the auspices of being actual medical facilities. Several years ago, Dr. [ ], my current employer, was set up by the antis to be hit by his car. In that same time period a priest chained himself to our clinic door and others invaded the clinic attempting to destroy the property and abortion equipment. Arrests were made for the invasion and prosecution was successful. With regard to the allegation of the anti-abortion activists that Dr. [ ] "hit" them with his car, the judge considered it ironic that a cohort happened to have a video camera to record the scene. The antis tried to drop the charges. Dr. [ ] countersued and won. No picketing has taken place at this facility since. Worth noting in humor—the last attempt they made to picket, it was determined they had to exercise their free speech outside of our private drive on a grassy area. Dr. [ ] promptly had a sprinkler system installed. After a couple of showers, they left this clinic alone.

Though the previous paragraph mentions the "limited" nature of current activities, [ ] Family Planning

Services, the clinic I direct, has received several forms of vandalism, including a gun shot through a window that caused the entire window to shatter. There has also been one bomb threat on January 20.

In May of 1989 I went with a freelance journalist into a Crisis Pregnancy Clinic located immediately next door to a [ ] abortion facility. As I was entering a pro-choice escort said to me, "Ma'am, you are not entering a legitimate abortion clinic." A woman who had been holding open the door to the "clinic" since I had opened my car door said, "Yes we are. Come right on in." She asked my name and acted as if she was checking it off of an appointment book. She took the urine I brought; it belonged to a pregnant friend. She then had me fill out the equivalent of what one would normally expect in a medical office. After completing the form, she said I, with my friend, had to view a film before I would be allowed to proceed any further. The film began as if it was a simple educational film to make certain I, the alleged patient, was aware of the risks with abortion, etc. Suddenly, before my very eyes, I witness an abortion in which the patient on the procedure table is jerking, as if she was receiving electric shock therapy or having an epileptic seizure. Blood was spattering everywhere as the physician was repetitively inserting a long tube into the patient's vagina; quickly and each time his arm would extend about two feet into the air before entering her vagina again. Then I viewed Dr. Wilke of National Right to Life fame speak of the "killing" I had just witnessed.

NARAL may be more interest in blockades, etc. The aforementioned is what happens on a day to day basis in [ ]. Terrorized women, fraudulently advertised to, entering "fake clinics" and before they realize where they really are, they have given their name, address and phone number.

As an escort I have observed anti-abortion picketers photographing all people who enter clinics. I know of one particular instance in which an anti recorded the license plate number, got the name of the owner and called to preach on the evils of abortion. Sadly, the person who owned the car was the mother of a woman who had not confided her pregnancy to her family.

Everything worked out fine but temporarily destroyed the relationship between mother and daughter. The daughter had been impregnated by the mother's boyfriend. While the patient did not consider her pregnancy a result of rape, she maintained that the mother's boyfriend had taken advantage of her when she arrived home in a drunken state. The incident was the only sexual contact of any sort for the patient in months.

The antis routinely place photos of fetuses on the windshields of cars parked at abortion facilities. They also force literature upon women as they get out of their cars to enter the clinics. The antis literally yell at women such things as, "Lady, don't kill your baby." and "We will pray for you not to go to the Devil." On several occasions anti-abortion activists have parked numerous cars in clinic parking lots, forcing women to park further away, thus enabling the antis a better opportunity to propagandize. They apparently schedule their "parking duties" in increments of 15-30 minutes because clinics have been unable to prove this. In many instances, one anti will park and another will drive her/him away.

I know my comments are of little help to your argument. However, I want you to know, there is so much I suspect but am unable to prove. I have driven into the parking lot of my job to find that our dumpster has been raided, etc. While Arkansas has been rather fortunate in terms of clinic blockades, we do have a fair amount of horrendous anti-abortion activity going on. I always refer back to the fake clinics because with each new edition of a phone book I learn of the proliferation of their

fraud (in the name of Christianity) by ads being placed under the "Abortion" heading. Communities with limited access to healthcare in general and college and metropolitan areas appear to be the primary target of the crisis or problem pregnancy businesses. I know of a recent instance involving a 34 year old woman who had already lost custody of two children fathered by two different men. She was a cocaine addict wanting an abortion. On three separate occasions, a crisis pregnancy center told her was not pregnant. They kept suggesting she had a "tumor" in her uterus. By the time she made it the clinic I direct, she was 23 weeks. She now has a sickly two month old girl, no job, no knowledge of who the father is and, unfortunately, a grim future.

Please feel free to contact me if I can be of assistance. Keep up the hard work!!

* * * *

LETTER—C4

I have worked at a doctor's office specializing in abortion for nearly ten years. I have dealt with anti-abortion activity and Operation Rescue in particular in almost every capacity; as a staff person, as an escort, as friend of patient, as a participant in many court cases—pretty much, you name it, I've been involved. Add to that the fact that our office is in the city where OR originated (we were the first place Randall Terry ever picketed) and it should be obvious that I have seen every type of intimidation and belligerence these people use in their attemts to control women's lives.

So—some "pithy" examples:

Twice (6/2/86 and again later that year) our private parking lot was filled with cars belonging to OR members, parked tightly togethet and locked to prevent us from opening our dooor and getting patients in. I took several hours for them to be towed; we did enjoy stomping around on the hoods a lot.

We had one real "Rescue" on 10/28/88. One hundred and fifty people sat in front of our door, some locked and chained together, in an attempt to keep the door shut, keep patients out, and harass and intimidate them. They resisted arrest and had to be dragged onto buses by the police.

Several times Randall Terry has invaded our waiting room, either alone or with a few cohorts, to "preach" and pass out "literature", often because he recognized a patient and wanted to harass her personally.

OR members standing at the edge of our parking lot have been heard to yell to patients "She's not a real doctor", "The ambulances takes dead women away from here all the time", "You'll never be able to have children again", "Your baby will feel pain and scream", "They're going to stick a metal tube inside you with jagged edges and crush everything", "They're going to put your baby through a meat grinder" etc. ad nauseum

Staff have been harassed at home and in public—OR has picketed homes and restaurants where staff are eating.

Our locks have been glued shut several times. OR picketers have recognized patients and followed them into the office and then called and harassed them at home.

I can't count the number of times I've seen a patient come in crying, near hysteria, totally intimidated by the OR picketers. Or the times patients have called from nearby, too frightened by protestors to even enter the parking lot. Or the times patients attempting to pull into the lot have had the way blocked by picketers refusing to move, so left and then called to say they couldn't handle it.

This is only a small part of what I have seen and heard. Feel free to contact me for more info or specifics, or if I can be helpful in any way.

* * * *

LETTER—C5

I am the Personnel director of the [ ] Women's Health Center. After three years of constant picketing and blockading, the [ ] Women's Health Center was invaded on October 24th, 1989. The invasion into our building was a frightening escalation of tactics by the anti-abotrion activists. Praying on our compassion, two women pretending to be harrassed by the protesters on the sidewalk, sought refuge in our building. Once the locked door was open, 39 men and 13 women charged out of a moving van and stormed into the [ ]WHC, knocking me to the waiting room floor.

While I was trying to reach the telephone, a man bodily trapped me while I watched hordes of people invade the building. I feared for the safety of the staff. I envisioned the damage and destruction to our property. Fortunately, some of the staff on the 2nd floor were alerted to the assault by the thunder of footsteps on the porch. They immediately locked the fire doors at the top of the stairs, effectively confining these individuals to the stairwell. There the staff remained, safely sealed from the attackers.

A patient was trapped in the counseling room adjoining the occupied hallway. She had come to the Health Center that day for further screening of an abnormal pap smear to determine if she had cervical cancer. Staff was unable to reach her. She was alerted through the intercom that the building had been invaded and that the police were on their way. When three men entered the room she bravely told them to get out and leave her alone. Police soon arrived to escort her to safety.

It took 6 hours to remove the intruders who had bicycle locked their necks together. As [ ] police attempted to remove these people, they struggled. Two policemen were injured in the process. Others were called Nazis. That afternoon most patients were contacted and rescheduled for the next day. Those we couldn't reach ar-

rived and were abused by individuals outside who climbed on their cars yelling and screaming "we are here to help you". Over the long hours of the afternoon I personally endured vicious name calling and was subjected to their hateful behavior. A man calling himself Father Baby John Doe kicked me. I felt violated and assaulted in my own building. Like any cycle of battering, after being abused, assaulted and violated, their leader Michael McHugh, thinking this to be a righteous act turns and winks, stating, "we really love you people".

These fanatics reveal their true agenda. They demonstrated their disregard of women's health and well being. This becomes evident when they shout to a women in the driveway "*You* should die, not your baby." These are individuals who disrespect the integrity of a woman's conscience and care little about her life or her family's life.

Despite continued harassment, battering and the promised acceleration of these violent actions, the staff at WHC is resolved to continue to provide women with the quality care they deserve.

* * * *

LETTER—C7

I have volunteered to write a letter to you addressing the behavior of Operation Rescue supporters I observed while acting as a "defender" of a Planned Parenthood Clinic during the "DC Project II" in November 1990 as requested by the NARAL Foundation here in DC.

The most outstanding characteristic of the Operation Rescue participants that I felt was the feeling of a tremendous wall of water waiting for the dam to break. Clearly, no one knew any plan of action, but were simply waiting for someone to say the word to stampede. There was no central organization other than one person with a walkie-talkie. Early in the morning, there was a large crowd gathering across the street from the Planned Par-

enthood facility. They began shouting and chanting, many pacing back and forth. Some would choose a single person in the defender line to direct intimidating verbal attacks. Others simply damned the lot of us to Hell. Those that participated in verbal assaults encouraged others to do the same, often chiding their cohorts if they were reluctant to speak. Police came at some point and put up a police line, but to no avail. A signal was given and much of the crowd crossed the street. There was a period of time when Operation Rescue participants pressed up against the tape and the defenders, sometimes trying to crawl through people's legs. At no point after the crowd shifted across the street was there a break in the pressure of the Operation Rescue participants, until a signal was given and the crowd left the area.

The Planned Parenthood Clinic was the target of a minor hit that day, but I have never been in a more threatening situation. I was thankful that I wasn't involved in the more intense "scuffles" of the day.

* * * *

LETTER—C8

I am the project coordinator of the [ ], a project of the [ ]. We are a non-profit volunteer organization which defends women's health care clinics from Operation Rescue.

In my two years of organizing abortion-rights activists to counter Operation Rescue blockades, I have seen dozens of incidents of harassment, physical violence, and just plain cruelty directed at the women (and often times men) who need to get into these clinics; not just to receive abortion services I might add, but for the myriad of other services they provide—pap smears and cancer screening, prenatal care, VD testing, AIDS testings, pregnancy testing, etc.

There is however one experience I would like to relate to you which stands out in my mind; one which illustrates

not only the sheer meanness and unprovoked nature of Operation Rescue's tactics, but the pain and suffering they cause others.

In the summer of 1990, we received a call from the [ ] clinic located in East L.A.; a primarily low-income Hispanic neighborhood. These neighborhoods are favorite targets of Operation Rescue due to the fact that their residents have few health-care options available to them. Not only had this clinic been blockaded on several occasions in the past, but they were experiencing heavy picketing by Operation Rescue on the weekends as well. A priest by the name of Father [ ] was bringing out his church group—composed primarily of young teenagers—and instructing them to harass the women entering the clinic.

The clinic's doctor, Dr. [ ], shared office space with a dentist by the name of Dr. [ ]. On Saturady mornings, Dr. [ ] arranged for a dentist who specialized in children's dentistry to use his office so as to service the disadvantaged children of the area. The picketers were disrupting Dr. [ ]'s practice as well.

One Saturday, while the specialist was working at the office, a woman in the company of her two children approached the clinic. They were met by a frenzy of hostile picketers who shoved at them photographs of what they claimed were aborted fetuses and screamed at the mother, "Don't kill your baby!" The fact that the woman was there to see the children's dentist did not phase the picketers and they continued to harass and block her entrance into the clinic. Members of the center's staff had to step outside to help her in.

However once inside, the children were hysterical, crying out, "Mommy, don't kill us!"

As you might imagine, everyone involved—the mother, the children, the doctor and his staff—were terribly upset by the incident. The situation at the clinic continued on

this way for several months with little help from the local police. It finally ended when the priest and his church group decided to move on to another clinic. Currently, they are harassing women at a health care facility located in [ ], another low-income Hispanic area. The [ ] clinic, its patients and its staff, are experiencing the same kind of terror and frustration as were the folks in [ ].

The sad fact is, we can expect these types of situations to repeat themselves until *you* make it clear to member of Operation Rescue that behavior such as this will *not* be tolerated in a society which claims to care about its citizenry and their right to safe access to medical care.

Please, in reviewing the *Bray v. Alexandria Women's Health Clinic* case, keep in mind who Operation Rescue really is; their anti-woman agenda and the illegal tactics they employ. Most importantly, consider the people who are made to suffer the greatest; the poor and disadvantage of our community who have so few options to choose from, and who utilize women's health care facilities for the variety of services they provide.

* * * *

LETTER—C9

In November 1989 I was at the [ ] Clinic in [ ] Maryland when Operation Rescue blockaded the building.

Many incidents happened that were disturbing. The O.R. people followed a young woman across the street to her car and surrounded it. They then shouted at her shoving gory pictures of "fetuses" and plastic fetus-like dolls at the windows. At the clinic they encircled several of the clinic escorts, myself included, and pushed us away from the door back into the parking lot. People vied for the building doors and several clinic escorts were shoved into the plate glass windows and received cuts from the confrontation.

While the shoving and pushing was bad enough, the yelling and the taunts never stopped. They were an extremely persistent group and showed no respect even for very small children. A mother with her two children were simply walking by the clinic and cam up to find out what was going on when the O.R. people shouted at the woman and showed bloody pictures to her children who were horrified. The woman was very angry and upset and left the scene saying she would remain pro-choice. It was a disturbing incident—in fact, the whole day was very upsetting.

* * * *

LETTER—C12

Enclosed are my notes on the events that occurred on November 12, 1988.

At 9:10 a.m. my husband, girlfriend and I arrived at the Bellegrove Office Park. We entered the main doorway and saw a group of people in front of the entrance to my doctor's office. Whem we approached this people, we noticed that they all had signs around their necks. The group consisted of approximately 10-12 people with a man in front stretching his arms and legs from wall to wall.

When we reached the group, the front man said, "The doctor will not be seeing you today."

"Why," I asked.

Because he kills babies for money," he answered.

"He also delivers babies for money," by husband said.

I said, "I have to have a test at exactly 9:15 this morning, would you please let me in."

"If you need emergency care, go to the hospital," he answered.

"I am not here to have an abortion."

"We don't care."

My husband was going to force our way through, but at their very physical resistance, I asked him to stop. I slept very poorly the night before this occurred. I was having a lot of problems with hypoglycemia during my pregnancy with terrible headaches occuring when I didn't eat. I usually had to get up at least once during the night to eat to avoid these migraines. I had already endured a lot to be ready for this test and I did not want to go through it all again. After going through not eating, drinking high-sucrose liquid, the beginnings of a migraine and no sleep (not to mention being 7 months pregnant) this confrontation brought me to tears. As It was Saturady, my husband and girlfriend were there to comfort me. That was fortunate as I usually came alone to these exams.

Another patient came and led us around to the back entrance of the doctor's office. I was still very upset and was trying to calm myself down. I mentioned that I was here for the diabetes test and then went and waited in the lobby for a few minutes. There were three other women present in the lobby at that time.

My husband and I went into the exam room for my test. We had made a Saturday appointment specifically to discuss some important issues with my doctor, but due to the circumstances, it did not seem appropriate to bring these issues up at this time. He was visibly upset by this demonstration. This affected our doctor-patient relationship. After the test and my exam; my husband, girlfriend and I approached the back exit to leave. By this time there were lots of protesters outside. All three entrances were blocked by approximately 20 people each. I tried to open the door and they wouldn't move. They looked at us and started singing Christian hymns. I banged on the door and yelled at them, "You're not going to let us leave?!" To this, one person simply waved his hand at us and they went on singing and praying and

swaying. I just stood there amazed, I couldn't believe they were imprisoning us inside the building.

I was feeling fairly shaky and starting to be lightheaded by this point. The nurse offered me some tea, which I declined because I didn't want the caffeine, and I asked if they had any crackers. She got me some water and triscuits. I returned to the waiting room to wait and eat and try and deal with the anger I was feeling. I couldn't eat much because my stomach was so tied up in knots and the food was making me sick. My doctor was concerned about me and he offered to call an ambulance for me, thinking surely these people would let an ambulance through. I felt uncomfortable with that idea though as I was not having a medical emergency at that time.

We sat in the waiting room with a woman from NARAL and two other women. We discussed what we should do. The doctor called the police department again and asked them what they were doing about this situation. The [ ] P.D. had only 6 police officers on duty which they did not feel were enough to confront this situation and so they were calling in another shift. Meanwhile, we would just have to wait.

My husband then called 911 and asked for a police escort out of the building. Then another patient called 911 and did the same. Finally, after another 10 minutes of nothing happening, I called 911 and said that we were still waiting for our police escort. The dispatcher said that they were doing everything they could and we needed to just be patient and wait. Luckily our two-year-old daughter was with her grandparents and not with us as this would have been extremely traumatic for her. As it was, they were expecting us shortly and we couldn't reach them to tell them what was going on.

Time passed, with much pacing and speculation, and finally at approximately 10:30 to 10:45 (1 1/2 hours

after we arrived) the crowd in the front entrance separated and a man came down the stairs. We had locked the door to keep the protesters out, just in case. This man said that he was a police officer here to escort "the pregnant woman" out.

We asked to see his badge. He presented it and then I told him that would not leave unless everyone in the lobby who wanted to could leave with me. He asked the crowd if everyone could leave. They agreed and we filed out. The crowd called out things like, "God Bless You," and "We love you." At this point I was very mad and turned and said, "Bullshit!" Not knowing what else to do, we walked to our car.

This was very anticlimatic to us as we were all so mad at having our rights violated and being held hostage for such a long period of time. The news crews didn't ask for any statements from the people held in the office and that evening the news didn't even mention the fact that we were kept hostage by these people. It was very frustrating for us, because we felt that the public didn't know what these people were really capable of. My husband and I couldn't forget about it for quite awhile and were very tense and preoccupied. This caused our daughter, a high-need child, to feel very upset and we had quite a few bad moments. My husband and I fought a lot that evening, something that doesn't usually happen, due to this upsetting using situation. I also broke 4 crystal goblets that evening because I was too preoccupied to be thinking clearly.

These people have every right, in my opinion, to express their points of view. I deeply believe in our constitutional rights to freedom of speech. However, they do not have the right to infringe on my rights or put my unborn child at risk. Due to the circumstances I was very upset; and at 7 months pregnant, my doctor felt that an early labor could have been brought on by such

a situation. I have to say that I feel that these people are hypocrites. If anything, this demonstration by Operation Rescue has made me much more determined to see that women's rights are protected from people such as these.

Good luck in your efforts. If I can be of any future assistance, please feel free to contact me.

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LETTER—C13

As a volunteer escort, since April 1988, I could tell you numerous stories about Operation Rescue, it's affiliates and anti-choice "counselors" who go out to abortion clinics. I will relate three brief anecdotes in the hope that it will shed some light on the problems these people present.

First, in April 1988 I was exiting a 14 story building which housed on it's third floor an abortion clinic. Outside were approximately 10 anti-choice demonstrators. As I walked out the door, one of the protestors threw a rock which hit me solidly on the neck. This single event pointed out to me the necessity of assisting women in getting into clinics without harassment.

Another highlight event occurred around Thanks giving of 1988. A young woman (approximately 16 years old) and her mother asked me and another escort to escort them into an abortion clinic where there were about 20-30 "sidewalk counselors" and protestors present. As we approached the building, 7 or 8 anti-abortion "sidewalk counselors" rushed up to the young woman, screaming "don't kill your baby", and waving literature and physically separating the young woman from her mother. The young patent became so frightened, that she threw her arms around my neck and jumped up into my arms. I put may arms around the patient and, as I di so, the back or my hand brushed the coat of one of the sidewalk hasslers. The sidewalk hassler began

screaming that I had assaulted her. As I was literally carrying the terrified patient to the door of the building, the "counselor" was screaming at the police to arrest me. Fortunately, there were enough witnesses that the police did not arrest me.

Finally, on Dec. 2, 1989, "Project Rescue" was assembling in a shopping plaza to go, as a group, to a Maryland clinic. The people coordinating the "rescue" were C[ ] G[ ] and T[ ] O[ ]. I was standing in front of Mr. G[ ]'s van. He knew that I was a pro-choice escort. Mr. G[ ] decided that it was time to leave and began driving. As the van approached me, in a panic, I pushed back against it. A nearby police officer ordered Mr. G[ ] to stop. Continuing forward, Mr. G[ ] screamed "No we have to go rescue babies." Meanwhile, about 15 other pro-choice friends ran up and tried to lift the front of the van to prevent it from running me over. The police officer then slammed his hand on the top of the van and again ordered Mr. G[ ] to stop. This time Mr. G[ ] did stop. I was pregnant at the time this took place. This caused me to have some early pregnancy spotting.

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LETTER—C14

This letter regards the upcoming case of *Bray v. Alexandria Women's Health Clinic.* I feel compelled to write regarding my experience as a clinic escort who has witnessed the tactics of Operation Rescue and similar organizations.

From my experience in clinic defense, I am convinced that the agenda of Operation Rescue and similar organizations is not to exercise free speech, rather it is to bully and intimidate women from utilizing clinic services, services ranging from contraceptives, prenatal care, annual check-ups, pap smears, and breast exams to abortions.

Furthermore, there exists no doubt in my mind that they intentionally target women who are in a vulnerable position because they perceive women as easy marks and a convenient medium to advance their dictates of social behavior. The actions of Operation Rescue clearly demonstrate that the overall agenda of Operation Rescue is to scapegoat women for perceived social ills. From a spring board of moral arrogance, Operation Rescue feels empowered to accost women as they approach clinics and further subject these women to an invasion of privacy and public humiliation. Operation Rescue hopes to scare women away with such tactics. Furthermore, Operation Rescue does not care why a woman is going into a clinic. They use the clinic location as a venue to berate women and to attack any woman who does not fit their profile of how women should behave.

Physical intimidation and verbal assault are the primary tools employed against women by anti-abortion groups. They refrain from accosting men on public streets to demand personal information on pregnancy states, marital status, religion, or his sex life. Instead they assail women. A woman approaching a clinic is first surrounded by anti-choice demonstrators who shout at her to be heard over one another. If she tries to get away from them or says that she is not interested they persist in following, pressing themselves on her, and blocking her every step in order to continue their rebuke and deluge of contempt. Recently I witnessed a so called 'pro-lifer' hiss at a woman who was trying to extricate herself from a group of the blockaders, "Murderer, Murderer, Murderer. Kill, Kill, Kill."

The privacy and dignity of women is completely disregarded with every clinic blockade. That this kind of behavior has been condoned is unacceptable; that women specifically must bear the rage and contempt of Operation Rescue should no longer be endured.

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LETTER—C16

I write to describe my experiences as a patient escort for the Washington Area Clinic Defense Task Force. I have selected three of the most drastic circumstances in which I have found myself since I joined WACDTF last year.

The first violent experience I had with an Operation Rescue member was in the Fall of 1990 a the DC Project II "rescue". I had arrived at Planned Parenthood by Dupont circle at 5:00 a.m. to serve as a patient escort. I had been trained recently by WACDTF in escorting techniques and non-violent strategy. This training included instruction on how to de-escalate potentially violent situations, a necessity for me especially as I am 24 years old, 5'3", and 112 lbs.

Hundreds of Operation Rescue members and supporters gathered across the sidewalk from Planned Parenthood, and at about 7:00 a.m. began running toward the Washington Surgi-Center to blockade access. As my role on site is simply to escort patients into a safe clinic, I did not run over, but began to walk towards the clinic. When I reached the intersection of two streets a few blocks away from the clinic, I stopped because I expected some patients would walk by me on their way to the clinic and would need an escort. Both anti-abortion and pro-choice people were streaming by me. I was wearing an orange "pro-choice escort" identifying T-shirt.

A man in his late 50's or early 60's, about 6'1" or 6'2", wearing a clerical collar approached me and stood very, very close to me. He was carrying some sort of rolled up cloth which I assumed was a sign and wooden stakes to drive the sign into the ground. Because I was familiar with the basic tenet of never challenging a male who is physically threatening by looking him in the eye, I stood my ground, but looked into the crowd running past me. I kept my palms open so that he would see I was not looking for physical aggression.

He continued to breathe heavily, as though he were barely restraining himself from hitting me and to move very close to me, within 9" of my body. He said, "You had better get out of here, miss." I was scared, but I knew he was trying to scare me into leaving, so I kept standing there, looking into the crowd. He said again, "I'm warning you, miss. Leave now." I did not. He then took one of the wooden stakes, which seemed, from my peripheral vision, to be about a foot long made from rough lumber with a point at the end and a metal sheet in the middle, out of his bundle and into his free hand. It was trembling. He brought it up to my left eye, a little to the left of the center of my eye, and about 2 or 3 inches away from my face. He began to twist the stake slowly from side to side, not saying anything, but breathing heavily. Then he said, "Get out of here!" and he jabbed the stake toward my eye on each syllable.

I did not move, looking back on it, probably because I was too frightened to move. Then a group of escorts came by me and when he saw the orange T-shirts, he slipped back into the crowd and I did not follow him. I was pretty shaken up because this was my first hit. But it convinced me more that I needed to be out there escorting patients and protecting them from this type of violence.

The incident also angered me greatly. It was the first time in my life that I had been physically threatened. He was taking advantage of the fact that he was a foot taller than I, at least 100 lbs. heavier, and, for all practical purposes, armed. If I had been a patient, I would have fled immediately. I know that I did the right thing for myself and for the patients by standing my ground and refusing to show my fear. But I also realize that I put myself at tremendous risk of assault, and that if he had wanted to hurt me badly, he could have done it easily.

The second incident occurred a few hours later. About 10:00 a.m., Operation Rescue had blockaded the clinic,

so we could not get any patients in. We established a "safe house" to bring the patients into until the clinic was open again. We escorted two groups of patients in, when OR discovered the house. They stood outside waving pictures of aborted fetuses, etc., and shouting at the patients in the house. My partner and I slipped into the front door to find out what our next step should be.

When we looked out the window from inside the house, we saw that OR had surrounded the house in an attempt to trap the patients inside. We got a call from our group at the clinic who said that the police had secured the back alley and would hold it open for 5 minutes for the patients to get into the back door of the clinic. I quickly decided that, in order to protect the identity of the patients, patients should wear our orange T-shirts, and my escorting partner and I would pretend to be the patients. That way, the real patients would escort the escorts out of the house. We exchanged the shirts, and I took my hair our of the ponytail holder it was in so OR would not recognize me.

[ ], my partner, then attempted to open the door of the house. OR members were jammed against it in an attempt to keep the patients trapped inside. They were screaming "murderer", "please don't kill me, Mommy", "I will take your baby", and various other things. I heard one of them say "Don't let her out! Show her the dead baby!". I pretended to cry and grabbed [ ] hand. We struggled through the crowd, knowing that the two other escorts were leading the real patients into the back alley behind us. [ ] and I broke out of the crowd, and began to run up the street, away from the alley. About 15 members of the crowd began to chase after us, yelling "Stop!" and other things I mentioned before.

We finally turned the corner two blocks up the street and looked behind us. No one had bothered to follow us

that far. [ ] and I were both shaking and I realized I was crying for real. It hit us that we were being chased by an angry mob. Both of us are civil rights history buffs and at that moment we understood what it felt like to be a black voter in Mississippi in the 1950's. There was just no telling where the mob would draw the line. They had attempted to blockade us in the house, lain in wait for us to try to get out, screamed epithets at us, shoved us backwards into the crowd, away from the street, and run after us with signs and pictures. Having been a psychology major in college, I know a bit about crowd dynamics, and it surprises me to this day that [ ] and I escaped without being beaten up.

The third incident of violence occurred when [ ] and I were in Dobbs Ferry, New York to escort during a planned Operation Rescue hit. We had gotten up at about 5:00 a.m. to go to the meeting site of OR and see if we could get information about their plans. We were in our car in the parking lot of the OR hotel when we saw OR's leaders—B[ ] J[ ], K[ ] T[ ], and R[ ] T[ ]—get into a van and begin to drive away. [ ] was in the drivers seat and I was in the passengers seat of our car. We pulled out ahead of the van in the parking lot and, in an attempt to delay their departure, turned off the motor in our car, thus cutting off OR's path to the road.

After they leaned on the horn and we did not move, B[ ] J[ ], an ex-cocaine dealer who now works as T[ ]'s bodyguard, jumped out of the van and ran up to my window. He flashed some sort of press identification and said that he was with the press and needed to get out. I said our car was stalled and that our friends were calling the tow truck. Then he began yelling at [ ] to move the car or he'd make sure we moved. We did not move the car. Then he ran to the side of the drive and picked up a jagged rock. He came back and stood at my side of the car and tapped the rock against the windshield. He kept threatening us, saying

no one else was around. I was too scared to look around to see if he were telling the truth, but I grabbed my camera and got pictures of him holding the rock. I rolled down the window so I could hear what was going on outside and I heard him say he was going to kill us if we did not move. I was terrified because not only was the rock about 8 inches from my face on the windshield, but one of the WACDTF members had recently been hospitalized after an OR member attacked her with a flashlight in an abandoned parking lot. I grabbed a jacked to shield myself if from the glass if it shattered when [ ] pulled forward. We looked behind us and saw that the rest of the WACDTF caravan had arrived in the parking lot to provide witnesses and support. Our sense of relief was overwhelming and I managed to get pictures of the van's license plate.

The police had also arrived, so we followed the van onto the highway to see where it was headed. Another of WACDTF's cars had pulled out ahead of us and we saw the OR van attempt to run them off the road several times. We ended up losing sight of the van then.

The rest of the day was pretty antagonistic on both sides. I had to follow OR around all day, but they made no more threats. [ ] and I have decided never to drive with just the two of us in the car when we go on hits. We also decided to team up with another Task Force car when go to OR's sites. It is just too risky to travel in one pair. I cannot imagine the confusion and terror of a single patient who is not familiar with OR. They are an organized terrorist group that resorts to threats and violence to carry out their agenda. They are NOT non-violent pacifists or civil resistors.

I do hope these accounts help NARAL. I am giving you permission to use my full name and to contact me to speak or to testify on these incidents. Please do not hesitate to call on me if I can be of help.

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LETTER—C22

I am writing in response to NARAL's request for information regarding personal experiences with Operation Rescue activities.

I am the Director of Community Relations at [ ] Clinic in [ ], Virginia. Our clinic has been a target of anti-abortion activities since it's opening in 1973. In January of 1989 at the annual Roe vs. Wade day protest, D[ ] V[ ] announced the onset of local Operation Rescue activities in Norfolk. We had an aborted rescue approximately a month later. On April 29, 1989 a rescue was held rescuers blocked all entrances to our building. Sixty-two arrests were made and all were later convicted of trespassing. On May 25, 1989 before the clinic opened for the day I noticed a woman standing by the door to the clinic. I opened the door to let her know we would be open shortly, as I did, six men rushed around the corner, ripped open the door, rushed into the clinic, knocking me into a wall, a desk, and I finally landed on the floor. The invaders made their wya to the patient waiting room where they used kryptonite locks to chain themselves together. It took approximately two hours for the police to remove them from the clinic. Prior to this incident when asked by family and friends if I was afraid of the anti-abortionists I had denied that I would ever be harmed by any of the participants. However, after numerous trips to doctors and undergoing physical therapy for three months for injuries sustained in their assault, I now realize that they will stop at nothing to prevent women from exercising their legal rights.

The participants were found guilty of trespass and one male was found guilty of assault for which he received one weekend in jail. I was discouraged by the court's lack of appropriate punishment for this type of behavior. I filed a civil suit and the defendants were found guilty by a jury. I was awarded $7500 in damages. Several

unsuccessful attempts were made to recover the award from the defendants. I finally received one small check from a garnishment of one defendant's wages at CBN.

Since the invasion in May 1989 we have had numerous incidents of trespassing on private property and harassment of patients. We had another invasion on September 8, 1990; thirty-five arrests were made for trespass.

One January 26, 1991 approximately twenty-five members of Operation Rescue protested at my home carrying signs saying, among other things, that I support the murder of babies. Early this past March, Operation Rescue leader, Randall Terry, held a meeting at a local church. The day after the meeting a protest was held at our clinic at which Terry announced new tactics for OR including protesting at clinic employee homes. After the protest twenty to twenty-five participants moved their activities to my home and neighborhood. They carried sings and leafletted my neighborhood and nearby businesses. The handbills included by name and address, stating that I am a leading abortion provider at [ ], the local abortuary. (I am enclosing a copy of the handbill) The local police were called and a sergeant informed the protestors of a state statute prohibiting picketing in neighborhoods. To compound the confusion, two local television stations and the local paper showed up to cover the activity. The activities totally disrupted my home and my neighborhood for over an hour. Fortunately, most of my neighbors were supportive of my situation, even if they are not supportive of the abortion rights.

When I began working at [ ] as a counselor in 1985 I understood that not everyone would agree with my choice of employment. I also understood that by accepting the position of Director of Community Relations I would be more visible to anti-abortionists and therefore subject to more harassment. I did not. however, expect the behavior exhibited by members of Operation Rescue.

Members of this organization are terrorists, they will stop at nothing, not even physical assault to achieve their goals. I have heard their leaders compare their activities to Martin Luther King and the civil rights activities of the 1960's. I see no comparison, Reverend King espoused non-violent protests. Never was physical assault of individuals condoned.

Although the number of participants in OR activities seems to be shrinking, the behavior of those remaining is getting more and more desperate and aggressive. It is frightening that a minority of individuals are attempting to impose their beliefs on women who are exercising their right to choose when or whether to parent and on individuals providing legal medical services. This imposition goes far beyond our constitutional right to freedom of speech. It has extended to physically blocking access to medical facilities, invading clinics, destroying private property, harassing patrons of medical buildings and assaulting women.

We need strong legal measures to prevent this atrocious, illegal behavior. A message must be sent to Operation Rescue lawbreakers that illegal behavior will not be tolerated.

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LETTER—C26

As a counselor for the past two years at [ ] Women's Health Center, I am happy to share with you and members of the Supreme Court some of my experiences in dealing with anti-choice protestors outside our clinic. Since November of 1990, our clinic has been hit particularly hard with anti-choice protestors who blockade the clinic doors on days when abortions are performed. On these days, patients and staff members entering the clinic are called names, shoved, screamed at, surrounded and blocked from entering. This includes women who are coming in for routine gynecological

services. Every day I see the horror, fear and anger on the faces of our patients, their families, friends and partners.

I remember one young Hispanic couple in particular who came in last December. The woman was carrying a fetus which, through amniocentesis, was determined to be without kidneys. Their doctor told them that the fetus probably would not survive delivery, but would definitely not be able to survive on its own. Because protestors were sitting in front of our doors, myself and another staff member pulled the couple over the protestors and through the doors. You could see the shock and dispair, especially on the husband's face, who by now, was in tears. They told me that they wanted to have children, but under the circumstances, felt terminating the pregnancy at that point was the best thing. The people blocking the doors just made a very difficult experience even more traumatic.

Since November, we have had staff and patients slammed between the clinic doors or have had fingers, feet, and arms trapped in the doors as protestors pushed or leaned against doors. We've had protestors block the doors with parked cars to which they chained themselves. We've had our locks glued and doors cemented shut. In addition, we have 8-15 police officers at the clinic. Our police force in Milwaukee is already understaffed and overworked. This is a waste of taxpayer's money. Our clinic has been issued harrassment injunctions against several regular protestors, however, Milwaukee's District Attorney, Michael McCann, who is anti-choice, often overrules Judges' decision to issue on the injunctions.

The situation in front of our clinic is becoming increasingly volatile. It is just a matter of time until someone is seriously injured.

I feel strongly that these individuals have a right to pickett. However, they should be required to do so peacefully. They are not only denying my right to enter my place of employment freely, but also denying women from receiving gynecological care and from exercising their right to a safe and legal abortion.

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LETTER—C27

My husband and I often do escort duty at a clinic where they perform abortions.

I remember one particularly ugly protest. We were escorting in a tearful woman and her husband who had been waiting in vain for the protestors to disperse.

The husband told us that his wife was diabetic and had been advised by her doctor that an abortion was medically necessary. To carry the pregnancy to term would likely cost the woman her life, and she had made the decision to abort, thinking of her husband and their three children.

You can imagine what a difficult decision that had been for the woman to make. And now, as we escorted her to the door of the clinic, the crowd of protestors screamed the word "murderer" at her. Some kept pleading, "Mother, don't kill your baby."

This is outright cruelty. For the rest of her life that young woman is going to wonder whether the guilt they tried to heap on her was justified. Had she been selfish, choosing her life over her unborn child's? How many times that terrible scene will replay itself and she will wonder if she really is the monster the anti-abortionists say she is.

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LETTER—C29

In response to your request of April 4, I am writing this letter to relate some of my experiences with anti-choice demonstrators who are connected with Operation Rescue. I am a 56 year old woman, an active volunteer

in many human service and cultural organizations in the Dayton, Ohio community. Recently I received the "volunteer of the year" award from District 7 of the National Association of Social Workers. I have also been named as one of the Top Ten Women in the Dayton Area as well as receiving numerous other recognitions throughout the years. Governor Celeste of Ohio appointed me as one of 25 members of the Ohio Commission on Volunteerism. I tell you these things to establish that I am a credible person and highly respected member of my community.

In August of 1986, after viewing the activities of the demonstrators at a clinic in Dayton, Ohio, I contacted the clinic and volunteered to escort women from the parking lot into the building in an effort to protect them and provide support while they endured the unbelievable harassment of the demonstrators. I remain the ony clinic escort in the Dayton area. I volunteer two to four mornings a week at the clinic and have done so for almost five years, so I have had ample opportunity to observe these people.

My experiences brought me into daily contact with D[ ] S[ ], who is currently leader of the Ohio Rescue movement, D[ ] M[ ], director of "Project Jerico", D[ ] E[ ], director of "Choose Life Ministries", and hundreds of their followers. All of these people have been involved in Operation Rescue and many have been trained by Randall Terry and/or members of his group.

From the very beginning of my escort work and continuing to this day, I have been subjected to many types of harassment. Verbal assault consists of being called "murderer, butcher, garbage of society, vulture" etc. as well as comments about my personal appearance (hairstyle, clothing) and my lifestyle (the size of my home, the car I drive, etc.). There were numerous verbal threats made about my daughter, who was 24 years old.

Comments such as "we know where your daughter is, we know where she lives". They also learned the identity of her fiancee and in June, 1988 when she was planning to be married, the demonstrators threatened to "publicly embarrass" me by appearing at her wedding, forcing me to have police officers at the church and at my home where the reception was held.

Large color photographs of fetuses bearing the incription "Killed by you", as well as other anti-abtortion materials, were regularly left in my mailbox. Letters were written to the Presidents of Arts groups on whose Boards I served, demanding that I be dropped from those Boards because I was an "evil woman". When I served as Auction chairman of the local public television station, the station was harassed by phone calls saying that "you have a murderer as your chairman". My husband, an attorney, received letters from various anti-abortion leaders berating him for "allowing me to murder babies". I was followed on the highway by some of the demonstrators, who would tailgate me and/or pull in front of me, slamming on their brakes, all the while yelling out of their windows "murderer".

My home has been picketed on Saturday afternoons by as many as 30-35 people bearing signs saying "[ ] leads innocent children to their deaths" or "[ ], the Deathscort".

The harassment and intimidation at the clinic itself became so unbearable that the clinic was forced to file a lawsuit seeking an injunction—the injunction was granted. I was a witness in that lawsuit as well as subsequent contempt hearings, in addition to testifying in numerous trespassing charges brought in the local municipal court. When I sat in the courtroom after testifying I was verbally assaulted, pushed and shoved.

While carrying out my duties as an escort at the clinic, I have had a fetus in a coffin pushed in my face—when I

tried to enter the building to get away from the man who was carrying it, he grabbed my arm and pulled me off the step. On another occasion, the fetus was wrapped in a blanket and pushed in my face. This fetus, according to an interview given by D[ ] M[ ], leader of the Jericho Project, to the local newspaper was kept in a bottle of chloroform in M[ ]'s home. He boasted in the newspaper article that he had shown it to me.

On another occasion, I was walking with a patient to the clinic door, followed by a demonstrator (who was trespassing and violating the Court order). When I opened the door for the patient, the demonstrator grabbed both of us, throwing us to the graund, causing the patient to lose her shoes (to say nothing of the trauma she suffered). I have, along with the patients, been screamed at, pushed and shoved while escorting the patients through the parking lot.

There have been three "Operation Rescues" at the clinic where I volunteer. These have been the worst days of my life. On one of these days, I was standing outside the doors of the clinic when three buses pulled up and a large group of people (mainly men) came pouring out of the bus, ran to the front door and sat down in front of me, even sitting on my feet. When the police arrived they refused to move when requested to do so. I was eventually instructed by the police to step over them. At these rescues, clinic staff and myself try to protect the patients in the parking lot by encircling them. The demonstrators react by encircling us, pushing us out of the way to get to the patients, throwing literature at them and pulling and tugging at all of us. It is an unbelievably frightening experience. These are definitely NOT peaceful demonstrations.

The windows in the clinic have been shot out three different times during the night and it is also frightening to arrive in the morning to find windows shattered by

bullets and bullets lodged n the walls. The doors have been "super-glued" shut during the night time hours, the building has been covered with red paint, eggs have been thrown all over the building and the parking lot.

I do not believe that people have the right to blockade women's health clinics anymore than they would be allowed to barricade a bank's door because they didn't approve of the banking practices. "Operation Rescue" simply cannot be allowed to continue this type of horrendous harassment and intimidation of women.

I support women's reprductive rights and the right to choose. I am fifty six years old. Abortion was not legal when I was younger and I have personal knowledge of friends who were so desperate that they choose illegal, dangerous abortions. The mother of one of my friends died because she tried to abort herself with a feather and died of infection. I have always been very grateful that I was never in the position of having to make that kind of decision.

I could tell many stories of harassment of patients, but since you asked for stories of personal harassment, I have not included them. I could also tell many more stories of various incidents that have happened to me, but I hope this will be of some help to you.

By the way, I have no problem with my name being used in any way you choose and you have my permission to do so if you wish.

I currently speak quite often publicly about my experiences and/or pro-choice issues. The local newspapers and television stations also interview me about pro-choice matters. Of course, these always bring five a.m. phone calls with a male voice saying menacingly and deliberately "murderer . . . murderer . . . murderer." In other words, from the very beginning of my volunteer work at the clinic, every effort has been made to intimidate me, to

embarrass me, and to frighten me from continuing my work at the clinic. The demonstrators and particularly their leaders, are very unhappy that I am a very credible witness in court, that I am a respected community leader, that people listen to me and believe me.

My work at the clinic has brought me to NARAL. I am currently Vice President of NARAL OHIO and co-chair of our local NARAL.

Please let me know if there is any way I can be of help in the future.

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LETTER—C33

I'm writing to share my experiences with clinic blockades, with and without injunctive relief. I am Executive Director of seven ambulatory surgery centers that perform abortions. Six of these facilities have been blockaded by a group known nationally as Operation Rescue. All of the six clinics have been "hit" on more than one occasion. I was present for all but a few of these trespasses/blockades. The locations are: Alabama, Mississippi, North Carolina, South Carolina and Tennessee, and the years include 1988 to the present.

In February, 1989 I was contacted by Knoxville, Tennessee City Police Department and told that a national anti-abortion group planned to block access to my facility on February 4, 1989. The police officers explained to me that they had made several "deals" with the trespassers such as: 1. The leader would be allowed to orchestrate the "sit-in" and would not be arrested; 2. All individuals wanting to be arrested would be carried on stretchers in order to keep the clinic closed as long as possible due to the stretchers requiring more police officers per person; and 3. The bystanders who called themselves "prayer support", would not be arrested.

I questioned these "deals", and the officer explained that there was no way to prevent this huge group from

coming onto the property and the main concern of the police department was to avoid a riot and/or violence if several hundred people got out of control. That is what Operation Rescue had threatened if their demands were not met.

I stayed in the clinic all night before the blockade was to happen, waiting and worrying. At approximately 6:00 AM I went outside and talked with an officer who was passing by the area. I was told to meet the group of trespassers at the property boundary and inform them as they stepped onto the property that they were trespassing on private property and that I was asking them to leave and they would not be arrested if they left at that time.

My vision up to that point was that this was going to be some kind of symbolic sit-in. At 7:30 AM, approximately 350 people came marching toward my building in block formation, about twelve abreast. I met them at the property boundary with two private security guards and said what the police had instructed me to say. What a joke—not a funny one either. The mob pushed me all the way to the front door of the clinic and proceeded to pin me and the guards against the brick wall and door. There were thirteen female employees now trapped in the building. More of the group went and blocked the two back doors. (Our windows do not open for security reasons.)

I screamed toward the door to "Call the police!", hoping the employees could hear me over the cult-like chanting and singing of the trespassers. These people were physically rough and abusive to me and the guards. They hit us, they bit us, they pushed and shoved us. I was elbowed so many times I thought I would faint. Approximately thirty minutes later, the police arrived and began the arrest process. I asked them to please put an officer in my place so someone could continue to attempt communication with my staff. The captain felt

that this would further complicate the situation, so I stayed put. For three and a half hours I was against that brick wall and door while the Operation Rescue people held bibles up to hide their friends' faces on the bottom of the pile that were pinching, hitting and biting us.

I have enclosed photographs showing: 1. The crowd at the door, and 2. the bruises on part of my body resultin from the blockade and assault. The experience was a nightmare. I would never have believed something like that could happen in broad daylight in America. Incidentally, the clinic is a licensed, ambulatory surgery center regulated by the Tennessee Department of Health and Environment.

I responded to this invasion by acting within the limits of the law. I sought and obtained injunctive relief in Federal Court. Within a few days after the temporary restraining order became a preliminary injunction, Operation Rescue violated the injunction and were found to be in contempt of Federal Court. After being found guilty of contempt, *none* of the defendants have violated the injunction though they still protest and picket *lawfully* on a regular basis. The injunction only stopped the unlawful and violent activity. It has given me and others renewed faith in the American legal system as well as two years of relative peace.

We operate two clinics in North Carolina that have not obtained injunctive relief and they are continually attacked and vandalized. In March, 1991 a radical group known as "Lambs of Christ" pushed their way into one of the North Carolina clinics and twenty five people locked themselves together in the surgery area. It took the local police and fire department ten hours to cut them loose, and the cost the taxpayers was tremendous. A couple of weeks later, other members of the "Lambs" poured gasoline over a car's interior, parked it to block our clinic doors, and then locked themselves to it. Again,

police officers spent hours trying to unlock the offenders and arrest them.

In summary, I have had numerous opportunities to see how radicals act in the face of an injunction, and how they act when there is no serious consequences for their illiegal actions. The clinic injunctions work to keep the peace and still provide for legal protest activity.

Thank you for your time and your interest.

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LETTER—C34

In November of 1989 I went out two Saturdays in a row to help the Washington Area Clinic Defense Task Force defend clinics against Operation Rescue. It was a very sobering experience for me. I went with an open mind, fully convinced that the blocking of women's health clinics and the bullying of women should be opposed, but reserving judgement about the kind of people who would do these things. I still have an open mind, but the individuals I encountered the second Saturday at a clinic in [ ], Md. did not earn my respect, and the experience made me question why they would call themselves "pro-life."

I was one of the first people to arrive at the clinic. We linked arms and formed a line across the rear door. The clinic is in an office building and the doorway has several large panes of plate glass. Soon the people from OR came and lined up in front of us. They began pressing against us and somehow one of the clinic defenders fell or was pushed into one of the panes of plate glass and it shattered.

Luckily, the man was not hurt, but the partially shattered window with shards of glass hanging down posed a considerable danger to the people thronged around the door, especially because there was so much pushing in the tightly packed crowd and because all of us there on both

sides had such a high level of commitment to our beliefs that we were not going to just walk away. The danger was greatest for *us* because the window was at our backs and the OR people were leaning against us pushing us towards the doors. The police sent an officer in to the door to try to keep people away from the broken window.

I have been in several clinic defenses and there is always an extended period of standing sandwiched in a crowd with the OR people pressing against you. That day at [ ] was the worst I've experienced. I felt numerous times that the physical pressure would do some damage to my body. I was also very afraid, as I think we all were, that if the OR people kept pushing us against the doors another pane of glass might give. And the most disturbing and frightening thing about it was that when confronted with the prospect that we might get hurt, most of the OR people didn't seem to care.

We made numerous appeals to them to stop pushing. The police told them a couple of times to stop. But they kept the pressure on. At one point, I said, "If you don't stop pushing, someone may go through a window." A woman responded, "Oh, no one's going to go through a window!" I said, "someone *did* go through a window this morning!" She replied with a tone as if to say so what, "Well, I've gone through a window." A frequent response to our appeals that they stop was, "You're not in any danger. You can go home any time." To me that was like saying, "We're not threatening you. If we say 'I'm gonna hit you; that's a threat. But if we say, 'Move or I'm gonna hit you,' *that's* not a threat."

I believe very strongly in people's right to free speech and to protest and OR should be allowed to do that. But that is not their main business. Their main business is physically blocking access to a range of health care facilities for women and bullying and intimidation of patients, clinic staff, and pro-choice supporters.

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LETTER—C37

You asked for letters re experiences with anti-choice protesters.

I escort at Surgi-Center in Atlanta several Saturdays a month. A woman named M[ ] is there almost every Saturday morning (and clients have told me she is there some weekday mornings, too). M[ ] writes down the license tag numbers from all the cars parked in the clinic parking lot. Some of the clients who come from small towns are intimated by this. I went to some trouble to find out M[ ] name, address, and automobile license tag number. Now when a client or a client's friend says, "Why is that woman taking down my tag number?" I answer, "I don't know—but here is her name and address and tag number. If you are bothered in any way, you can give it to your attorney." Of course, I am only there some Saturdays, and M[ ] is there a lot more often.

A woman named N[ ] M[ ] came to Surgi a lot last winter and the first three months of this year. I haven't seen her in about three weeks—I think she is concentrating on protesting on weekdays now when there are no escorts present. N[ ] likes to stand at the waiting room window and sing "Jesus loves the unborn children." N[ ] also runs at cars that have pulled up in front of the clinic or in the parking lot and screams, "Don't go in there—you could die. That clinic isn't safe." N[ ] has a lot of urgency and immediacy in her voice as though she just found out the building was on fire. One Saturday I was walking a mother and her trembling teen aged daughter part N[ ] into the clinic, talking quietly to them. When we got to the door the mother said, "I wish you had been her yesterday. That woman (N[ ]) made my daughter feel so bad."

N[ ] concentrates on the youngest and most vulnerable looking clients. She tells the young men, "If you love

her, you'll get her out of there. She could die. That clinic isn't safe. If she dies, it will be your fault."

The anti choice protesters often tell clients that the clinic is about to be closed by the health department. Once (maybe more but I just know of one time N[ ] M[ ] demanded that a client parking in the clinic lot produce some identification. The client told us later she had no idea who N[ ] wa, but assumed she was someone in authority. When an escort came up to the car and N[ ] retreated the client was still fumbling in her wallet and said "Here's the ID that woman wanted."

All the anti choice protesters who come regularly have a printed list of "symptoms" that they say are experienced by women who have had abortions. When a protester chants these "symptoms" the effect is eerie, as though they are trying to lay on a curse. The "symptoms" include any discomfort that is likely ever to happen in life, such as headaches, cramps, bad moods etc. They also include a lot of discomforts that aren't likely to happen such as hallucinations, insanity, etc. I would say there are about 50 "symptoms" on their list and they follow a client from parking lot to front door, chanting all the horrors she will have to endure the rest of her life if she doesn't follow their advice.

On four separate occasions I have been physically threatened by anti-choice people while I was escorting, but I think three of those occasions were bluff. On December 1, 1990 the man who wasn't bluffing (in my opinion), walked back and forth in front of the Atlanta Surgi Center with a big sign on a heavy wooden handle. He shoved my repeatedly and said, "Stay away from me or you could fall and really get hurt" and "You could have a bad accident." He shouted at several clients, "So your going to pay to have your baby ripped out of you, eh?" We called the police and an Atlanta police officer walked this man 50 feet away from the clinic, read him the in-

junction, and told him not to come any closer. He stayed there awhile and since that Saturday I haven't seen him again, I am glad to say. A funny footnote is that when the police came, I said, "That man threatened me." The anti-choice protester was dumb enough to say, "I didn't threaten her; I just said she could have an accident. Anybody can have an accident."

Well, I could go on and on, but this gives you some idea of how things have been at one particular Atlanta clinic on Saturday during the last four or five months.

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LETTER—C38

Thanks a lot for letting me be a part of this. I have been escorting patients and "baby-sitting" clinics at least every other week since June of 1990, so I have had a chance to see at least some of what goes on.

In July of 1990 (2nd Saturday of the month), I was escorting patients at the [ ] Center in Dallas. Another escort and I were assisting patients to get into the back door of the clinic since the front was completely blocked by rescuers. Two male rescuers were sitting at the top of a very short (4 or 5 steps) flight of stairs between us and the door. They both stood up as we approached and refused to move when requested to do so. The other escort was in front of the patient and I was behind her. The other escort managed to push her way between the two men and to pull the patient with her as I pushed from behind so they could get into the clinic door. This so enraged one of the rescuers that he pushed me backward down the stairs. I was uninjured, except for an arm full of splinters from the wooden banisters and our patient made it in okay. A Dallas police officer was watching this entire performance. When I went over to him to complain that the rescuers were on private property and should not be allowed to push me or anybody else around, he said, "You can file an assault charge

if you want to, but it won't do any good." This officer was a regular beat policeman and was, apparently, completely in sympathy with the rescuers. When the Tactical Unit arrived, all of the protesters were removed from the clinic property. However, it was necessary to escort patients from their cars to the clinic with protesters trying to shove their way between me and the patient so they could "talk to her" and "give her something to read". This kept up from about 7:30 AM till about 2:30 PM.

In October of 1990 (again, a 2nd Saturday), I was baby-sitting a different clinic, which was then located in a one-story, multi-tenant building. I was patrolling outside of the building when 5 or 10 cars pulled into the parking lot in a caravan. I went outside, locked the two outer doors of the building from the inside and notified the clinic that we were under attack so they could lock the clinic door into the hall. The rescuers completely blocked the front door (10 or 15 strong). A clinic worker had to get out of the building so she could give the trespass warning, as is required by Texas law. We went to the back door where we were met by another pro-choice volunteer and an armed security guard for the property. A group of rescuers blockaded that door as well. When we opened the door so the clinic worker could get out, they attempted, by main force, to shove their way through the door so they could get to the clinic. We managed to prevent this, but I was bruised up pretty thoroughly and got my shoulder strained so severely that a doctor's care was required. I could not file charges, since several people were involved and, in that kind of pushing and shoving match, it is almost impossible to say who did what. We did have a couple of patients get through this group and into the building (ironically enough, they only wanted birth-control pills, not abortions), but they had to shove their way through by main force. Again, Tactical Unit showed up and arrested 14 of the protesters. A "fake patient" had gotten into the clinic and, when she came

out, unlocked the front door so that two protesters could get in and lie in front of the clinic door. They were both arrested, but filed police brutality charges. One female police officer was also scratched up and bruised in her attempts to remove and/or arrest protesters.

The instances of verbal abuse to patients are nearly endless. One of the hardest things I have to do as a volunteer is to keep the men who come in with patients from assaulting the protesters. In one instance, a 17 year-old came in with his girlfriend. The protesters started with the normal "Don't let her kill her baby", "Be a man—that's your baby she's going to kill", "God made her a mother for a reason" nonsense. The patient burst into tears and the boy finally turned to the crowd and screamed, "Let her alone. She was raped!" One protester shouted, "How do you know it's not your baby she's killing?" The boy replied, "Because I love her too much to sleep with her before we're married." It took all I had to keep him from rushing out into the protester group and just beating up on anybody who was there.

Patients leaving the clinics are also abused, primarily verbally. Some of them are woozy from anesthesia and nearly all of them are nervous and upset. The protesters try to keep them from getting into their cars until they take the literature advertising post-abortion counselling and hear that God will forgive them if they repent.

Thank you again for letting me contribute. I am enclosing my release form and I have no problem with your using my name. Please feel free to contact me if I can be of any further assistance.

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LETTER—C39

I am wishing to support the National Abortion Rights Action League's suit again "Operation Rescue" and provide eyewitness testimony that the group known as "Operation Rescue" and others acting in concert with them are

NOT a non-violent organization. I am a co-founder of the group, the Washington Area Clinic Defense Task Force (WACDTF), which is a coalition of pro-choice activists and organizations committed to defending a woman's right to choose abortion. I also have coordinated escorting on a weekly basis at [ ] Surgi-Clinic at [ ] Washington, D.C. for approximately six months. In this capacity I have come in contact with the organization "Operation Rescue" and its affiliates.

There have been several incidents that I have witnessed where members of "Operation Rescue" have acted in violent and physically abusive manners. There are several others that I have not personally witnessed but have encouraged those who have witnessed them to write in and describe those circumstances. In addition to the acts of outright violence that I have witnessed by members of "Operation Rescue," there is a constant insidious threat of violence that is always present during a "rescue" attempt. This tension and harassment often leads to violence and is much more difficult to document because it relates to the atmosphere engendered by the actions rather than the actions themselves. Nonetheless, this aspect is just as dangerous as the actual violence that does occur because it provides the climate for these actions to happen.

One Saturday in November of 1989 (November 16, I think) "Operation Rescue" instructed its members to meet outside of the National Air and Space Museum early in the morning. This was their designated mobilization point where they would form a caravan and follow each other to a predetermined clinic in order to shut it down. WACDTF learned of the mobilization site and deployed pro-choice activists to join in the caravan to arrive at the clinic when "Operation Rescue" did. My partner and I got to the Air and Space Museum around 6:00 a.m. Shortly thereafter we were recognized by members of "Operation Rescue" as pro-choice and our car was surrounded by anti-choice protestors and eventually boxed in by the vehicles of anti-choice demonstrators. My buddy for the day, [ ] got out of the car and was grabbed by three members of "Operation Rescue." One was a priest named S[ ] R[ ] (from [ ]). Two "Operation Rescue" members restrained [ ] while the priest punched him in the stomach several times. I approached two police officers on the scene to intervene.

In another incident, a carload of "Operation Rescue" members failed to respond to a police order to stop their car at the mobilization site for a "rescue" attempt in December of 1989. The "Operation Rescue" members actually drove their car into the police officer who was dressed in plain clothes. He got on the front hood of their car while they continued to drive on. All the time he was yelling "Stop, I'm a police officer" and flashing his badge. Other police officers in uniform approached and the car stopped. The "Operation Rescue" members clearly displayed with these actions that violence is O.K. Running people down with their car is condoned. Luckily, no one was hurt. The officer knew what he was doing and was able to handle the situation. If this was a pro-choice activist I don't know if they would have been able to protect themselves as effectively.

Several hours later the same day that my buddy was assaulted at the Air and Space Musuem, a member of "Operation Rescue" in his zealous attempt to get into [ ] Clinic pushed a pro-choice activist through a plate glass window. Most of this activity was captured on video tape and some of it has been included in the "Stand Up for Choice" film on clinic blockades. The "Operation Rescue" member is seen running up to the door of the clinic, he pushes pro-choice activists away from the door. He checks to see if the door is locked. When he realizes it is locked, he pushes his way past and runs around to the other side of the clinic to check the other doors. These doors are also locked. He returns to the first side of the

clinic. Here he gets on his hands and knees and tries to crawl through the pro-choice activists. He cannot get through this way so instead he uproots a shrub at the far left corner of the clinic door. Here in his zest to get into the clinic to destroy equipment, he begins pushing against the pro-choice activists. The wall of the clinic in this area is glass and it gives way underneath the pressure of this attack. A pro-choice activist is pushed through the glass; glass fragments go everywhere. A long sheath of glass is left hanging dangerously. The "Operation Rescue" member's response is to pull a plastic fetus out of his pocket and begin declaring how he is non-violent. This was by far the most dangerous and frightening situation WACDTF personally experienced at a clinic. Actions such as these can surely not be called "non-violent."

In another instance a pro-choice activist was beaten with a flashlight when she was taking pictures of "Operation Rescue" members at the hotel they were staying in Virginia on the weekend of an announced "clinic attack." She and her buddy were in front of the hotel with cameras photographing all "Operation Rescue" members who went in and out of the hotel. One man walked out and turned his back so they were unable to photograph him. The two pro-choice activists walked in front of him so they could take his picture. Whereupon he started punching and kicking on of the pro-choice activists. The other took pictures which are in custody of the police. The "Operation Rescue" member kept beating her and starting hitting her with a flashlight. The other pro-choice activist called for help and the "Operation Rescue" member ran away. The pro-choice activist who was assaulted by the "Operation Rescue" member was hospitalized for her injuries.

Even while escorting on a regular Saturday basis, instances of physical assault have occurred. One anti-choice protestor has grabbed hold of a young woman by the

sleeves of her jacket and refused to let go of her so she could keep walking down the sidewalk. This anti-choice protestor was a nun. Another anti-choice protestor who is a large man, runs up the street at women. These women are so startled by a strange man running at them, that several of them have darted into the street to try and avoid him. They run into the street without looking for oncoming traffic. This has led to close calls and the anti-choice activist has endangered the welfare of citizens by his aggressive actions. I have also been physically threatened while escorting. One week an anti-choice protestor was surprised to see us, remarking "What are you doing here? You're supposed to be dead."

During a clinic attack in Dobbs Ferry, a carload of pro-choice activists were confronted by an "Operation Rescue" member threatening to throw a rock through their windshield. Events like these are too numerous to mention. However, as I alluded to before the climate of hostility and anger which lurks behind the actual physical violence is equally as lethal at these brutal events. Because this tension has been realized in several circumstances by actual violent consequences, this threat of violence is incredibly powerful.

Don't be fooled by "Operation Rescue," they are NOT a non-violent group. Not only has violence occurred at their actions, but their intent is not for a peaceful demonstration. It is to provoke and push things to the extreme. I hope that the cloak that "Operation Rescue" is trying to hide behind becomes dispelled by this suit and their actions can be seen for what they are: violent and dangerous.

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LETTER C40

I was the director of a women's health clinic in the Detroit area from 10/88 to 10/90. During that time, my clinic was the target of repeated harassment from the local chapter of Operation Rescue. There have been hun-

dreds of arrests at this facility on charges ranging from disturbing the peace and criminal trespass to assault and battery. We have had bomb threats called in while the staff was trapped in the blockaded clinic. The effects of the activities of Operation Rescue have been profound. We have had to utilize volunteer escorts to assist our patients in entering the building. The patients are subjected to a steady barrage of harassment every step of the way until they have safely entered the building. But even then, there's still a good chance that one of the protesters will open the door and stick his/her head into the waiting room and shout a variety of epithets. On several occasions, one of the more disturbed protesters has chased patients and/or staff around the parking lot in his van, shouting out the window through a bullhorn. The staff calls the police immediately, but by the time help arrives the damage has already occurred. Patients frequently arrive at the front desk shaken and tearful. I felt as though I were working in a war zone.

In January, 1990, the local chapter of Operation Rescue subjected my clinic to a "siege". There were several full blockades of the clinic door, as well as daily large-scale protests involving 75-100 picketers and "sidewalk counselors". On January 9th' our physician called on his car phone and said he would prefer to avoid the circus out front and asked if he could come in the back door. I agreed and assigned my assistant director the task of informing the volunteer escorts at the back door of the doctor's imminent arrival. As she opened the heavy, steel firedoor, I heard her scream. Seven protesters had thrown their full body weight against the door to prevent the doctor's entrance. In the process, they had pinned the assistant director in the door and she was being crushed by the combined weight of the door and the people pressing against it. I wedged myself between her and the door in an effort to gain some leverage and relieve the pressure on her. She was freed, the door was opened a

bit more and the protesters grabbed my ankle and pulled me to the ground. I landed on my knee and twisted it badly. I was half in and half out of the building, and I was crying and begging them to let go of me because I was injured. Several people were laying on top of me and their faces were inches from mine. Nobody moved, despite the fact that I was obviously hurt. Eventually the doctor and several staff members were able to free me and drag me backwards into the clinic. The police arrested all 7 for assault and battery, but they have yet to come to trial due to delaying tactics employed by their attorney (including entering a defense that their actions were justified because they were "saving lives").

As a result of that protest, I have had to have corrective surgery to my knee to repair some of the torn tissue. I was unable to walk without assistance for seven weeks after the surgery. Some of the damage isn't correctable, and I now have arthritis in the joint. I have to have additional surgery to repair ligament damage to my ankle.

In addition, my assistant director received treatment for bruises and a twisted shoulder, and the physician injured his back.

Operation Rescue is full of people who behave violently and erratically. The far-right precepts of the group attract extremists. These people have threatened to picket my home. I'd like to share a story with you about how this has affected my family. My husband and I debated about whether to tell our children about the possibility of a protest at the house. We eventually decided that it was better to tell them than to have them be surprised. In the course of the discussion, my 5 year old asked his father, "Will they break our windows?" His father replied, "No, it's against the law." Then my little boy said, "Wasn't it against the law for them to hurt Mommy?" And his father said, "The police will protect us." My son said, "But they couldn't protect Mommy, and they

couldn't stop her from getting hurt." It was tough to find an answer for him.

Our nation's women's health centers, their patients and staff members are being victimized by a small extremist group. Operation Rescue is a terrorist group, utilizing violence and intimidation. They should be treated accordingly.

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LETTER—C43

In response to our phone conversation of April 27, 1991, I wish to document for your files the violent occurrences I have witnessed in regards to Operation Rescue's behavior.

November 15-17, 1990 Operation Rescue came to Washington, D.C. for D.C. Project II. Their goal was to blockade abortion clinics in the D.C. area, and receive media attention for their efforts. I am a volunteer participant for the Washington Area Clinic Defense Task Force (WACDTF). Our goal during these attacks was to keep these clinics open, assuring women of their reproductive freedom.

Thursday, November 15, 1990

Thursday evening I met my partener at the [ ] metro stop, and we headed over to where Operation Rescue was lodged during the D.C. Project II weekend. Our assignment was to photograph people involved with Operation Rescue to update our files. We were making our way through the parking lot when we saw two men approaching us. I agreed with my partner that I should photograph the one on the left, and she, the one on the right. I took my subjects photo, while my partner focused in on her's. As I lowered my camera, I saw my partner's subject—a man that we have identified as "Ed", one of Randall Terry's body guards—rush my partner, picking her up, and slamming her against the brick wall of the hotel. She got up off the ground, whereupon, "Ed" rushed her again, forcing her to the ground, kicking

her in the stomach, back, face and breasts. "Ed" then pulled out his metal flashlight and began clubbing my partner on the head and neck with the instrument. During this time, my partner had curled up in a ball, attempting to protect her head and body. I was photographing the entire incident. All the while, "Ed" was screaming at my partner that he was "going to kill her", calling her a "murderous bitch", "cunt", "whore" and "slut". I attempted to intercede, and "Ed" turned towards me with his raised flashlight, until my partner's movements brought his attention back to her, and he continued to beat her. I ran to get help, and upon my return, "Ed" had fled off into the parking lot somwhere. The [ ] police arrived, and I filed a report with them, and they confiscated my film for the trial.

Later that night, a new partner and I followed a van of Operation Rescue followers on a high speed chase across the [ ] bridge and into the city, eventually to arrive at Planned Parenthood at [ ]. During this time, the maroon van we were following repeatedly tried to run us off the road, not only endangering our lives, but the lives of the young people inside the van, and other commuter traffic.

Friday, November 16, 1990

Operation Rescue decided to hit a clinic at [ ]. later that morning at approximately 8:00a.m. In our attempts to gain access to the doors to maintain the clinic, Operation Rescue proceeded to physically prevent us from coming near it. The forcibly pushed us from the front lines, pushing and shoving WACDTF members from the property, leaving us helpless, with nothing to do except wait until the police arrived to take them away.

Saturday, November 17, 1990

Operation Rescue decided to hit the clinic at [ ] on Saturday morning. There were seven layers of people,

layered as in one row of pro-life persons, another layer of pro-choice persons, another of pro-choice persons, etc. so on and so forth. I was on the back lines with a smaller Operation Rescue man in front of me. During the six hours we were positioned there, the man repeatedly elbowed my breasts, or fondled them, stepped on my toes, or hit me in the stomach. I asked him to please stop, as he was hurting me, but he did not respond. A smaller woman two rows up from me was sandwiched between two Operation Rescue males, who linked arms, and repeatedly assaulted her from the front and the back. I attempted to have two of our people relieve the pressure from her, but they could not break the hold that the two OR men had established. When the woman was finally set free, and releases—after the police said they would begin making arrests—the women walked across the street, and proceeded to vomit for fifteen minutes, before she passed out—fainted—from lack of oxygen.

During the course of the weekend, other incidences arose where OR persons surrounded cars, preventing their movement towards the clinics, surrounded women patients, preventing their access to the clinic, and verbally and physically assaulted pro-choice advocates.

Both WACDTF and Operation Rescue groups claim the tactics of non-violence. However, OR's behavior during D.C. Project II indicated their ideology is anything but. The violence and brutality of such a movement should be stopped. Our right to choose between abortion or carrying a pregnancy to term should not be attacked, or denied by such violent means, if, indeed at all.

I hope my recollections have helped you, Ms. Murphy. If I can be of further assistance, please feel free to contact me.

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LETTER—C44

I am writing to describe some of my experiences with Operation Rescue blockaders (or those using similar tactics). I was an escort on several occasions for women (and men, at times) trying to enter clinics that were being blockaded by "protesters." (I also trained our local volunteers in escorting, legal observing, and non-violence during these blockades.)

As an escort to women (and their partners) who were trying to enter clinics, I can attest to the intimidation, harassment, verbal assaults, and emotional threats on patients seeking very personal medical care. Some examples may help. In Bellevue, Washington, I witnessed a woman who was in the advanced stages of pregnancy, in tears, trying to convince blockaders that she did not want an abortion, but needed to see her physician because she was not feeling well. Those who solidly blocked the stairway and entrance to the clinic showed no concern for her, her pregnancy, or her need for medical care. It was hours before she could enter and receive much needed care. (I later witnessed some of these blockaders at legislative hearings in our state capitol refer to cases like hers as "casualties of war.") At the same blockade, a young woman who had returned from college for the weekend, just to have her yearly pelvic exam and PAP smear, was unable to see her physician and had to return to college without seeing her doctor.

At other clinic blockades I have seen women being called names, having magnified posters shoved in their faces, and being presented with personal, unsolicited "advice and information" about the most personal of decisions. Women and their doctors were called murderers. I witnessed women who were afraid to leave clinics after their medical procedures, fearing what the "protesters" might say or do to them. Other women had to wait lengthy periods after entering clinics, in order for their blood pressure to return to normal levels, so that medical

procedures would not be unduly risky. Women who had taken special time off work and made special arrangements for childcare paid dearly for the extra hours it took to clear doors of blockaders. And I saw "sidewalk counselors" (always accompanying the blockaders) trying to be chummy and "helpful" to woman trying to enter the blocked clinics, by offering them coffee and/or doughnuts—knowing full well that drinking or eating food before a surgical procedure could put the woman at serious risk.

Somehow, as I write this letter years after the blockades took place, I'm afraid that the extreme toll, in terms of fear and intimidation, that the blockaders procured, will seem muted and trivial. Please realize that having to fight your way through people trying to block your access to health care is not only a draining ordeal physically, but emotionally, as well.

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LETTER—C47

I have been a volunteer patient escort at Planned Parenthood in [ ], Missouri for about four years. During that time I was at the clinic most Saturday mornings.

I have observed many instances of extreme and bizarre behavior on the part of the anti abortion persons. Verbal abuse is common and is directed at escorts, employees, patients and their companions. Often this abuse consists of derogatory remarks concerning race, sexual orientation, religious beliefs, age and motivation. These verbal assaults are by screaming or the use of amplified bull horns. Sometimes delivered from a distance of two feet or less. Often persons leaving the clinic are followed by protestors screaming and shouting.

Ingress and egress to the clinic is often impeded by protesters physically blocking the sidewalk or driveway.

The most frequent targets for these actions are women walking or driving alone.

I have seen protesters place themselves prone in the drive or public street in front of moving cars forcing the drivers to stop. Recently a protester's leg was run over after he placed his leg under the wheel of a moving vehicle. He is now bringing legal action against the driver!

Physical confrontations are not common in my experience. However, on three occasions I have been involved in such actions. Each was initiated by protesters placing their hands on me while blocking my progress along a public sidewalk.

At Planned Parenthood I have seen the windows after they had been shot out. I have seek buckets of blood and decayed animal parts that were thrown on the entrance. I have experienced the results of noxious chemicals introduced into the air supply system. I have seen junk cars abandoned in the PPH driveways and groups of prottesters chain themselves together blocking the entrance.

In short, the protesters behavior has been threatening, intimidating, and frequently destructive. An occasional arrest followed by a small fine seems to spur them on to greater excesses.

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LETTER—C48

On Friday, April 26, 1991 at 11:00 a.m. I had a regular scheduled appointment with Dr. [ ] Michigan) to obtain prenatal care for my impending *birth* of my baby on August 28, 1991. I have a risk pregnancy as I am of age 37 and have asthma. I had gone to have testing done at a local hospital (1 CVS test and 3 amnios) the previous months for genetic testing and this appointment was for continued and follow up care for my pregnancy.

As I arrived at the 3-story public office building, I noticed the parking lot was full and two [ ] Police Department cars were near the front door of the office building. I started to go in the lobby of the building and was told by Operation Rescue protestors that the building was closed. I said that I had a doctor's appointment and my doctor was waiting for me in his office. The protestors asked who my doctor was and I told them. They said that Dr. [ ] was not seeing anyone. I asked a bystander why, and who were all these people (the bystander happened to be a [ ] reporter). He told me about the protest on Dr. [ ] for performing abortion.

I then started to approach the elevator of the building to get to the second floor telling people that I was here to have to *have a baby not have an abortion* but there were protestors in the elevator, filling it up, and they pushed the stop button of the elevator so it would not go up. I then had several protestors come up to me and tell me I did not was to see Dr. [ ] because he was a baby killer. I told the protestors in the lobby again that I was not here to have an abortion, I was seeking prenatal care. They told me to go see someone else and then proceeded to give me pamphlets on free prenatal care and propaganda/pictures (disgusting) of botched up abortions. I happened to have my 12 year old daughter with me (and her friend) and the people approached her with these pictures also and asked her if she needed any "help" (thinking she was pregnant and wanted an abortion.)

I started to climb the stairs to the second floor. I was determined to see my doctor as I work full time and scheduling an appointment is hard for me (to take off work) and this was a holiday for me (Good Friday). Protestors were lined up and singing, blocking the stairs. I excused myself and pushed my way up the stairs.

I reached Dr. [ ]'s office where the entire hallway of the second floor was blocked by protestors. I went near the office door and several men blocked the entrance (door) by *laying* on the floor and barricading the entrance. I excused myself and told them I had to get in because I was having a baby not seeking an abortion. They told me not to see him, his office was closed and he was not in. I said I would see for myself and the protestors started *pushing me* and told me not to step on the men which were in front of the door (which I wasn't and didn't—being 4 months pregnant). Then I turned around to leave and the protestors pushed all around me so I couldn't leave. I told them I wanted to leave and let me out. After 3 minutes of trying to push myself out, they moved aside.

Meanwhile my daughter was being harassed by the protestors about "needing help" and I told the protestors that were around her that she was just with me on my visit but they continued to harass her and showing her pictures of the aborted fetuses.

We made our way down the stairs and entered the lobby and was approached by people in the lobby again. I told them that they were interfering with my rights to seek prenatal care at this doctor. I was then told that I should not want Dr. [ ]'s medical help because he is an abortionist (I later found out by him of his total practice, only 1% of this is abortions anyway—he is not an abortion clinic). I told these people that I didn't care and wanted his medical help.

They started arguing with me and one woman came up to me and started to tell me of her experiences with him and she would not let me see this doctor. A nun also started to give me a long lecture and pamphlets on right to life. I said I was going to have this baby, that I just wanted my follow up care.

I believe in pro choice—this is my right—and also it is my right to see what doctor I want to see without interference from anyone else. If these people are allowed to do this, telling me who is right and wrong then the next thing they will be telling me is what church, etc. I can go to. If I was raped or my baby was badly deformed (as I have 3 friends with babies of this nature) I would have an abortion. The cost to care for these children is so high and the State pays for a lot of it also putting strains on money, etc. This is my right. Also, if this was a strike against a company, it would be my right to walk across a picket line. These people would not even let me into the office door.

I approached one of the policemen that were at the building and I told him that these people were interfering with my right to see my doctor. He told me he couldn't do anything because it could cause a riot. At the same time I was complaining to the officer, a receptionist from a psychiatrist's office on the third floor was complaining to the officer about these protestors following their patients up to the third floor to this doctor's office when these patients had nothing to do with seeing Dr. [ ]. These people were on medication, etc. and were getting harassed by these protestors. The officer said he couldn't do anything because he couldn't follow every single person up into the building (No one was getting in anyway).

I left the building and came back several hours later when I saw the building parking lot was almost empty and no protestors were around. I finally did see my doctor that day and was told by his office that they were in the office at that time but couldn't get out, etc. because they were barricaded in the office.

I find this totally offensive in the right of my choice!

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LETTER—C49

I have worked at a [ ] Abortion Clinic since 1976. Feb. of 1991 was my first experience with a protest at my home in rural Wisconsin on a State Hwy. The message was clear of pure intimidation for me to quit my job. I have young children, felt invaded, vulnerable and more strong for the cause that people "like these" feel they could "force" me not to work where I choose.

My name was used on all the signs and 7 of the 10 picketers were *men*. I am convinced that I was followed home to locate me.

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LETTER—C50

I strated a general practice including 1st tri abortions 1 year ago, purchasing the practice of an elderly man upon retirement.

He, his practice of 15 years, his employees were *never* picketed, despite late 2nd tri abs. Upon arrival of a [woman] physician, we have had daily clinic harassment, weekly home picketing of woman physicians, women staff. Again, the male provider in town with 7 years experience has had 5 or 6 episodes of half-hearted home picketing.

Addendum:

We've had one clinic blockade, which lasted only 2 hours due to the heroic efforts of the [ ] Police Dept.

42 approximately those arrested for trespassing + resisting arrest have demanded jury trials to deprive the office of personnel to continue business.

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LETTER—C52

I have defended abortion clinics for the last year and a half, with the Washington Area Clinic Defense Task Force. During that time, I have witnesses many incidents of physical and verbal violence and harassment by

members of Operation Rescue, Project Rescue, and other anti-choice organizations toward clients, their family and friends, clinic staff, and pro-choice escorts, including the following:

—In November, 1989, over 1000 anti-choice protestors blockaded the entrances to the [ ] clinic in [ ] Maryland. The clients who were waiting to get inside were having second-trimester abortions, which means that the procedure had been started the day before and had to be finished that day. The clients waited inside cars which were then encircled by pro-choice activists, to prevent the anti-choice protestors from rusing up to the cars and yelling at the women inside. As each new client arrived, pro-choice escorts had to form a circle around her and lead her through a crowd of anti-choice protestors and T.V. news cameras to join the other clients and the clinic staff.

After many hours, during which the police arrested only a few of the hundreds of people illegally blocking access to the clinic—despite a Maryland law against blocking access to medical facilities—several of us took the clients and the clinic staff in our cars and left the clinic, hoping that Operation Rescue would also leave, claiming "victory." A few members of Operation Rescue pursued us for several miles. When we finally evaded them, we waited in a restaurant for several hours until the protestors had left, and then returned to the clinic. Three anti-choice protestors remained. As we ran from our cars to the doors, they rushed at us, jumped on us, and tried to knock us down. Only the presence of the pro-choice defenders and several armed police officers kept the clients and staff from being harmed as they went inside.

—Earlier, at the same clinic, a pro-choice defender was pushed through a plate glass window by an anti-choice protestor trying to push behind defenders to get to the

door. Fortunately, the defender who went through the window was wearing a bicycle helmet and so was not seriously injured. (I did not witness this incident, although I have seen it on videotape.)

—At many different clinics, I have seen anti-choice protestors engage in what they call "sidewalk counseling," ostensibly to provide women with information about alternatives to abortion. Many of these "counselors" show no concern for the safety of the clients, pushing and shoving them, stuffing literature into their pockets after they have declined to take it, blocking their path, and screaming at them.

The very presence of a crowd of protestors at the door of a clinic often intimidates clients; if pro-choice escorts did not approach them and offer assistance in getting inside the clinic, some of these women would leave without getting the medical care for which they came—which might be an abortion, a pregnancy test, a gynecological exam, or other form of health care.

The right to choose abortion, and to choose other health care, is meaningless to women who l[illegible]ally cannot enter a clinic. The protection of this right [illegible] responsibility of the state; unless this Court upholds laws and court orders which prohibit the blockading of clinics access, it will continue to fall to pro-choice volunteers to ensure that women can exercise their constitutional choices.

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LETTER—C54

I am a volunteer clinic escort in [ ], Pennsylvania as well as the political action chair for [ ] NOW. I have been active fighting to insure abortion rights since I was in high school and helped reactivate the NARAL chapter here in [ ]. One specific incident is hard to discern from the last six years. I have been called names, spit on, bitten, pinched, kicked, elbowed and punched and

once in Colorado Springs I was shot at by a so called pro-life sniper.

The incidents that seem to stay with me the most are the ones that involve anti-abortion protesters' children. These parents have no regard for the safety or well being of their children even as they scream . . . "I'll take your baby".

One of the clinics, Women's Health Services Inc., is located [ ]. The wind that comes off the river in the winter is numbing. The children frequently have neither hats nor gloves. In summer, the children play in the gutters as their parents harass any women that looks like they could be pregnant, anywhere from age 12-60. Also, the children are laid upon the hot sidewalk to nap in the sweltering heat. Another activity for these children is to use them as shields.

In the spring of 1990 Women's Health Service's had over two hundred protesters in front of the high rise office building where they are located. The escorts had formed a protective wedge around the patient and her friend. As we approached the entrance of the building the crowd of anti-abortion protesters swelled. They screamed at the patient calling her a murderer and they told her the abortion would give her brain damage, we pushed on. An escort to the left of the patient had his knee kicked out from underneath him, he fell to the ground. I was at the front of the wedge and was trying to avoid the men that attempted to obstruct our progress by standing in front of us. Suddenly an older woman pushed a small child in front of my legs. I had over 30 people pushing from behind and somehow I managed to not step on this child who surely would be crushed by the throng of people. I placed my hand on the child's shoulder and pushed her to the side as quickly and gently as I could. The police stood by and watched as we approached with a look of astonishment but they did nothing.

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LETTER—C55

For the last year, I have worked on behalf of women's reproductive rights, both as a volunteer and a paid staff members of Planned Parenthood of [ ]. I have escorted at Planned Parenthood's downtown D.C. clinic (at 1701 Q St., N.W.) on a number of occasions.

This past fall, Operation Rescue held huge demonstrations at Planned Parenthood's Q St. Clinic on two consecutive mornings. The street was clogged with demonstrators, police, press, and clinic defenders from 5 am onwards. Clinic patients were forced to come to the clinic at an extremely early hour. They had to make their way through throngs of people, often confused as to who was there to help them and who was there to hinder them. They had to duck under a police tape and have their name verified and bag checked at the clinic door. Once inside the clinic, they were not permitted to leave.

A number of patients ended up not showing or rescheduling their appointment for an abortion because of the ruckus and inconvenience caused by the demonstrators. Such delay only increases the danger to the woman of the abortion procedure.

I have witnessed how patients, upon seeing their entrance blocked, had to resort to calling the clinic from a pay phone at a neighboring restaurant to request that an escort come get them and accompany them to the clinic.

Both on these days of planned demonstrations and during "regular" days of clinic operation when we have our handful of regular protestors, I have witnessed abortion patients having literature thrust in their face as they try to mount the clinic steps, descend from their car or try to reenter their car. I have heard patients being harangued for not heeding their "baby's heartbeat." I have seen signs saying "Abortion Is Murder," & "Stop Baby Killing" accompanied by gruesome pictures of

fetuses. Such pictures not only upset and almost always *anger* the patients, but also often disturb the young children of the patient who may be accompanying *their mother.*

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LETTER—C59

My name is [ ] and I am an employee at [ ], a health care facility, in [ ], Texas. The below account of an actual act of terrorism which occured at our clinic on March 29, 1991, will probably sound like a horror story to you; and so it should. To myself, other employees of the clinic, our patients and their family members, this encounter with terrorist who call themselves protestors, was a horror.

At approximately 9:45 A.M. on March 29, 1991, a group of terrorist calling themselves "protestors", entered the [ ] Medical Building at [ ], Suite [ ], in [ ], Texas. These "protestors" entered on the false pretext that one female "protestor" needed a prengancy test. As this female "protestor" was ushered into the private lobby area for said test, she quickly jerked open the door to the outer waiting area, allowing her fellow "protestors" to storm in. the "protestors" forcably and violently rushed through the door, knocking three employees of [ ] Medical Group against the walls. There were approximately eight "protestors" who gained immediute entry to the private lab area of our health care facility. [ ], an employee of [ ] Medical Group issued a verbal criminal trespassing warning, asking the screaming "protestors" to leave the premises. Immediately, a scuffle started. One "protestor" grabbed an employee by the left arm, yanking her around in such a violent manner as to leave bruises on her arm. This employee, who had just had surgery on said left arm, also had damage to the surgery area. The "protestor" then proceeded to strike her twice in the ribs with a fist in an attempt to gain further entry into the lab rooms.

A second "protestor", who had gained entry by another door unlocked by one of his fellow "protestors", struck another employee full force in the eye while aiming the blow at a patient. At this point, patients were running in an attempt to escape the "protestors", while employees and family members tried to protect them. The "protestors" were shouting their personal beliefs about abortion, accusing the patients and their families of hidious crimes. They (the "protestors") verbally attacked the patient's personal right to be at the Clinic in an extremely violent manner; also verbally attacking their families personal beliefs. The scene that followed was a complete fiasco. At this point, I was struck many times in the sides and stomach by arms and elbows of the "protestors" as the swung blows at my fellow employees. Approximately, forty patients and their family members were in the clinic at this time. The "protestors" who had gained entry into the private lab area, pushed and shoved their way into the lab waiting area. At this point, approximately sixteen "protestors" had gained entry into the private lab area. While some protestors were striking blows, other were shoving, shouting religious beliefs, shouing scriptures, condemning patients and their families, shouting slogans, singing songs, verbally attacking employees, and violently verbally attacking patients. Employees of the clinic, extremely concerned for the patients safety, were attempting to seperate the patients from the violent attacks and secure them in a safe area away from the "protestors". The "protestors" were pushing and shoving, trying to follow the patients all the while screaming at them. At this point, the patients were crying and the look on their faces was one of total disbelief.

The male family members of the patients; fathers, husbands and escorts; although seemingly not as afraid or emotionally stressed, showed complete fury at the situation. They defended their rights and the rights of their daughters, wives and girlfriends to make their own choice to the screaming mob. At the same time, they

were still attempting to physically protect the patients bodies from the physical assaults of the "protestors". The aggressive nature of the "protestors" almost made this a physically impossible feat. One father, as the "protestors" shouted their attacks at his daughter, finally became physically violent. This father had come to the clinic with his daughter, who was a Middle School student. He shouted back at the "protestors" asking them "what made them think that they could possibly understand his situation or know what was right for his daughter and family in this given situation". This man was so emotionally distraught that there are no words with which to explain the extreme duress he and his family were going through. The husband of a young black woman was also shouting back at the "protestors" telling them that they did not understand the difficulty of raising, supporting, emotionally supporting and giving enough love to the four children he and his wife already had at home. He told the "protestors" how the government was already having to help them financially and that this decision, made by he and his wife, was their personal right giving the "protestors" no right to interfer. Other men were screaming out their situations in defense of their families basic right to make this choice. While the shouting, pushing confrontation continued, the employees of [ ] Medical Group were finally able to secure the extremely emotionally upset patients in a safe and secure area. All employees at [ ] Medical Group are women who were certainly no match for the six foot male "protestors" who were attacking us as well as our patients and their families. Out of the group of "protestors" who gained entry to the private lab area and were physically and verbally launching this attack, only one was a woman.

We, as a nation, have just lost valuable lives in the Middle East, defending freedom. For terrorist calling themselves "protestors" to think that they have the right to put their own personal beliefs or ideas on another

family that is trying to handle their own personal and private affairs in the best possible way for their families is appalling. I personally cannot understand how, here in America, we can allow religious fanatics who feel they have the right to try to force their personal beliefs on others to cause such acts of terrorism as the one displayed at our clinic. To interfer with basic family planning would allow others to cut to the very core of family life. In a clinic such as ours, we see many different family situations which explain reasons that women have made this choice. These reasons include financial, emotional, ability to care for existing children and in some cases are drug related. These women are trying the best way they know how to make the most difficult decision of their lives at a time when they are already emotionally stressed by their situation. Before they enter our clinic, they have already had many family discussions and disputes over the situation they are in. This is especially true of parents with young girls who have been on drugs and feel that it is better for a decision to be made now. For terrorist, calling themselves "protestors" to enter and physically/verbally abuse these patients at a time such as this is the height of total cruelty. These so called "protestors" show a complete lack of human caring and character beyond compare.

As a health care facility, the emotional health of our patients and their families is of the utmost importance. These "protestors" care nothing of our patients health wheather emotional, metal or physical, as is shown in the above incident. Their ("the protestors") only interest is in attempting to force their personal opinions on patients at an extremely crisis filled time in their lives. If something is not done to stop these acts of terrorism now, it is apparent that the violence will increase until it is completely out of control. Americans depend on our court systems and political networks to protect American lives not only on foreign soil, but also, here in America.

To be given the right to protest, non-violently, outside a clinic is one thing. But when courts allow terrorist to enter into the privacy of a health care facility, to physically as well as verbally terrify citizens, one begans to wonder what has become of human rights. Through out this letter I have referred to these so called "protestors" as terrorist. Websters Dictionary defines "protest" as; to state positively, to "speak" strongly against, to express disapproval, to object, a formal statement of objection. Websters Dictionary defines "terrorism as; the use of force and violence to intimidate causing intense fear. What was experienced at the [ ] Medical Group on March 29, 1991 by employees, patients and their families most definately fits the definition of "terrorism" more fully than that of "protest.

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LETTER—C61

On Saturday morning, February 7, 1987, I arrived at the [ ] Gynecological Center on [ ] in [ ] Connecticut. I was schedulled for an abortion later that morning. A this time, I was seventeen years old and in my senior year of High School in a nearby affluent suburb. A couple of weeks earlier I had made the decision to tell my parents about my unplanned pregnancy, knowing that they would be supportive. That Saturday morning I was accompanied by my mother and my boyfriend at the time. The first thing I saw as we enterred the parking small parking lot was a mass of people (men and women) moving about the lot with signs and pamplets in their hands. I began to get concerned because I had heard about anti-choice groups picketing and bombing abortion clinics so I asked my mother if she knew who they were. She glanced about nervously and told me not to worry. Obviously something was wrong.

As soon as we got out of the car a group of people rushed over and began shouting, "Don't do it", "Don't

kill your baby" "Please, there is still time", "Let us help you". I just stood there in shock; my mother and boyfriend quickly guided me toward the clinic door. Then all of a sudden, my arm was grabbed by an older man with white hair begging me not to go inside. People were still chanting and yelling things about killing babies. My boyfriend grabbed me and hurried through the door, quickly shutting it behind us.

Once inside I could still see sillouettes of people with signs through the sheer curtains—their voices muffled. My eyes began to fill will tears, tears of fear and tears of anger. "How dare they harass me, grabbing my arm; as if this hasn't been a hard enough decision for me to make." My mother hugged me and said, "I'm so sorry you had to deal with this. It's not right."

Reflecting on this experience four years later has evoked feelings of anger and outrage. There is absolutely no excuse for the hostile, intimidating behaviors that these anti-choice protestors direct toward women seeking abortions. The court order which prohibits anti-choice groups frokm blockading women's access to abortion clinics must be upheld. *No one* should have to go through what I did.

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LETTER—C62

I have been a volunteer "escort" at [ ] Center, [ ] Womenservices, [ ] since October 1988. In my capacity as "escort", I have witnessed the persistence of anti-abortion protesters. As patients are offered literature and advice, they usually walk away briskly, trying to avoid eye contact. I have even seen some push them away and have stepped between a protester and a patient's companion to stop him from punching one of them.

[ ] Center is in a medical building with many doctor's offices. The building has a private parking lot which the anti-abortion protesters routinely invade. One

Saturday, I saw a middleaged man with a very young girl as they were approached by a protester who was holding out his literature with pictures of fetuses on it. The man said "Please leave us alone, we are going to the dentist. My daughter is only 12 years old." The protesters continued to press the literature on them saying "Take it. You may need it some day."

[ ] Hospital is across the street from [ ] and many visitors to the hospital park in the medical building's lot. They area also accosted by the protesters and anyone who looks like they are of childbearing age is assumed to be coming for an abortion. Even people who work in the building are not safe. They are approached many times before the protesters recognize them.

The protesters stand on the stairs where there is little room to pass. One of them usually has a camcorder and videotapes patients. This is one of the most instrusive and upsetting things I have seen so far. The patients are afraid that they will see themselves on television, maybe the evening news!

At [ ] Womenservices, the parking lot is protected with a security guard posted so no one can trespass. However, I was there on Oct. 29, 1989 when "Operation Rescue" staged a blockade. There were about twenty people at the front door and about fifty people at the rear door. There were also many people with protest signs around. Many walked in the driveway and when people tried to enter the lot, they fell to their knees or threw themselves on the hood of the car prenteding to be hurt. It was very intimidating to the patients. The protesters stopped cars in the street and told them that the clinic was closed. (I have even seen them do this when the clinic was not being blockaded). The "escorts" were doing their best to help patients by rerouting them to the other clinic at [ ] which was open and giving them the telephone number of [ ] Womenservices in case

they wanted to reschedule their appointment. Some came by public transportation and were being harassed until we got them in one of our cars and took them over to [ ].

J[ ] E[ ] and P[ ] S[ ] were bargaining with the police. The lieutenant told J[ ] E[ ] that they were shorthanded because one of the policemen's father had died and they needed the policemen for his funeral cortege. He asked them to take this sad ocassion into consideration and stop the blockade. They agreed and left the door. As patients started to arrive from [ ], the protesters all ran to the door and quickly blockaded it again.

The police told us that they were waiting for a school bus to take the protesters away. The school bus finally came but then they said they needed a photographer to take pictures of them as they were arrested.

The police finally started to arrest some of them and put them in squad cars. There were three cars lined up but the protesters would not let them out of the driveway. One of the policemen told me that they didn't want to take sides. When I said that I assumed that he would be on the side of the law, he just shrugged his shoulders. One policeman asked when "Dr. Hoover" would get there. (a reference to Hoover vacuum). One lieutenant said they should be out chasing "real criminals like rapists who are supposedly a cause of all these abortions."

A patient got very restless and desperate and decided to try to walk over the protesters to get to the door. As we walked over to her to advise her that the door was locked and she couldn't get in, we were warned that if we took one more step we would be arrested. They then removed her from on top of the protesters. She then told us that she had six children at home and wouldn't be able to get back to the clinic since she lived 2½ hours away and didn't have a car. She had been able to get a ride

this time but couldn't get one again. Abortion is no longer available in her community because doctors who did them were picketed and harassed until they stopped doing them.

We had to encircle a woman who was being harassed until she was sobbing uncontrollably. She explained to us that she was only getting an abortion because she had taken accutane which causes birth defects.

There was also a laminaria patient who had to have her abortion completed that day or she could have had serious complications.

When the doctor came, P[ ] S[ ] and T[ ] C[ ] lay on the driveway, stretching across it so that he could not enter. They were arrested and taken downtown to be booked but were never charged. We stayed in the parking lot until 5:00PM when finally the protesters just got up and walked away from the door with the policemen watching them. Since local police cannot seem to handle these large demonstrations it seem to me that the only deterrent is an injunction that prevents this type of action. Since we have had the Temporary Restraining Order, there have been no blockades although one was planned.

P.S. There are so many stories of the harassment of women at the clinics but I don't have time to write a book!

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LETTER—C65

My name is [-], I am the director of [ ] women's Health Center, in [ ]

Since August of 1990, and up to the present date, Every Tuesday, Thursday, and Friday, on the days that we do therapuetic abortions, we have anti-abortion protestors at our clinic.

They do not protest within our local law on the public sidewalk.

We have a private parking lot in front of our clinic, and it is posted as such according to [ ] city ordinance. The protestors wait for a patient to arrive, several approach her car, and then as few as 1 or as many as 15 will sit down on the sidewalk in front of the door, and physically block ingress to and egress from the clinic. The patients have to stand outside on the parking lot, and have to wait until the police remove them from the front door. In the meantime other protestors called "sidewalk counselors" swarm all over them, trying to get them to take false information and trying to dissuade them from entering the clinic. The show them pictures of dismembered and decapitated fetuses.

I am out on that parking lot three days a week from 8am to 11am, while the police arrest these people. I have seen patients and their guests harassed and intimidated. I have seen them in tears, I have seen them physically pushed and pulled away from the front door.

Since August 1990, the police have arrested over 800 protestors at our clinic, with a cost to the city tax payers of over 10,000 dollars a month, for the police manpower it takes to arrest these chronic violators of the law

Women who choose to enter clinics for legal abortion, do not have to answer to these religious fanatics who claim to be missionaries for the pre-born.

When I am on the parking lot, they call me a murderer, a baby killer, the daughter of satan, they kneel at my feet and excommunicate me for the Catholic Church. They condemn me to hell. I also have been physically pushed on many occasions when I been with patients.

On several occasions we have had cars pushed up against our front door, with the protestors chained underneath. This is not an unusual site for most clinic

directors. They hand out fliers, like the one I have enclosed. I cannot believe that anyone can justify these actions If they would do the same to any other private establishment, their punishments would be more severe. The Supreme Court has made blocking ingress and egress to a private building not constitutionally protected. So why do we still have to be harassed and intimidated/

A womens right to travel freely without being obstructed or hindered, choice of occupation, and place of employment, are rights that are affirmed and guaranteed under the constitution. Most of us have lost those rights.

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LETTER—C66

As a physician in [ ] Georgia, I have been the object of anti-abortion protests since August 1986. The anti-abortion protesters apparently are seeking to intimidate any qualified physician who is willing to make public the availability of abortion services. The protesters have successfully intimidated the Mayor of this small city located within the metropolitan Atlanta area and the Police Chief as well. It is seldom that we have any significant action by the Mayor, the Police or the County law enforcement officials in regards to their criminal activities. The patients are subjected to whatever tactics the protesters wish to pass out on any given day. The protesters only fear Federal law and Federal authority. The protesters are now aware that they have nothing to fear from local political or legal authorities. Patients can now only hope that Federal law will continue to provide them with some access and protection as they seek adequate, safe surgical care.

On August 9, 1986, approximately 50 protesters assaulted employees and forced entry into all areas of a state licensed surgical clinic which provides abortion services. The entire surgical process was completely

closed because police were unable to remove the individuals. Outside the building, all driveways and streets were completely closed by more than 300 protesters who had gathered for a planned event. Only ten of these individuals were arrested and ultimately were given the minimum sentence of $200.00.

The protesters have been so successful politically against local authorities that they have forced them to deny the local police officers the right to work as security guards for my surgical facility. It is only through the fear of Federal intervention that I am able to continue offering surgical services for abortion patients.

On August 16, 1986, six men came into the Reception Area of my surgical clinic and chained themselves to furniture and a water cooler and had to be physically removed from the building by police. During this invasion of the building, more than 200 people blocked all access to streets and driveways including public passage of sidewalks and streets.

In December 1986, a large number of anti-abortionists successfully blocked the street and driveways to the surgical clinic causing a three car accident. Protesters were not charged by the police for causing this accident.

On May 3, 1987, approximately 80 anti-abortionists in teams of 20 per group physically blocked the driveways and streets to the surgical clinic. The police were aware that this activity would take place but made no effort to stop the criminal trespassing. As each twenty would be removed from the driveway by the police, another twenty would be allowed to enter and take their place. The streets were completely blocked as these individuals lay in all directions.

Since February 1988, the entrance to parking and the dirveways to the surgical facility have frequently been totally blocked by the dumping of garbage, large one ton

air conditioners, heaters and water heaters that completely prevented entrance to the property. These were dumped there by anti-abortion protesters to prevent the facility from functioning on that day.

In December 1989, the Atlanta Gas Light Company's meters and pipes were completely disconnected from the building and more than 200 anti-abortion protesters blocked all driveways and doors to the surgical building. During this particular protest and in the presence of police officers, all of the building signs were removed and destroyed by the protesters. Cameras were used to record the identification of patients and some patients were physically threatened if they continued to try to enter the property.

On December 29, 1989, approximately two hundred protesters successfully blocked the public street, the driveways to the surgical clinic and all doorways to the building. During this incident of criminal trespassing, the Atlanta Gas Light Company's meters were completely removed from the building. The Georgia Power Company's electrical power meter was torn from the building and the power lines to the emergency generator which provides life-saving power for patients were cut and destroyed. These criminal activities took place during the time that more than 40 policemen were on the property but made no effort to remove the individuals from the property. After several hours, approximately 20 of the individuals who did not voluntarily leave after four hours were removed and were identified as residents of at least eight different states throughout the United States. These individuals have been brought to Atlanta by Operation Rescue for this particular event.

Every day that the surgical clinic offers abortion services there are protesters attempting to prevent patients from entering the building and parking areas. On Saturdays, there are ten to two hundred individuals engaged in criminal trespassing and blockade actions with very little

prevention available from the local police authorities. These individuals have no fear of local authority and their activities will undoubtedly result in ending all safe surgical procedures by qualified surgical centers. It is only the fear of Federal action and authority that has prevented them from making more aggressive moves in my particular geographic area.

• • • •

LETTER—C74

I was present at a half-dozen or so clinic blockades in the Washington, D.C. area between April 1989 and November 1990.

I remember O.R.'s pushing and shoving and kneeing and elbowing, as they charged in large numbers through and over lines of pro-choice volunteers toward clinic doors and entrance ways. I remember O.R. "crusaders" shoving small plastic fetus-dolls in my face, and screaming at me, calling me a murderer.

I also remember the faces of patients arriving for appointments, seeing the blockades and having to react immediately. These were women's faces showing fear and confusion, panic and crisis. If they summoned all their courage and tried to get inside, with the help of escorts, O.R. still pursued them, chasing, yelling and grabbing. Many women simply turned around and went home.

One occasion, several women had to wait all day at a nearby restaurant until O.R. left the clinic premises. Because of the nature of their particular procedures, it was critical for them to see the doctor that day. When they returned to the clinic, after dark, they were physically and verbally harassed by O.R. people who had remained on site.

• • • •

LETTER—C75

Since June 1989, I have witnessed six anti-choice protests outside abortion clinics in the Washington, D.C./

Baltimore, MD area. Some were large, nationally focused events, and some were small and more localized. I attended to give support to patients exercising their right to choose and was clearly a pro-choice demonstrator and female- acting either as an escort, an observer, or peacekeeper.

I was not prepared for the first "clinic blockade" I experienced. I expected a non-violent sit-in similar to the civil rights protests and anti-Vietnam war protests of the 1960's and 1970's. I was very wrong. As soon as I arrived at the clinic, I could feel the tension. One of the first things I saw was a placard with bloody photographs on it. These photographs supposedly depicted aborted fetuses, but I suspected they had been doctored to increase their shock value. When I looked closely at them later (after my initial shock) they looked far too developed to be 1st trimester embryos.

I moved to join the pro-choice sympathizers who were near the doorway of the clinic. The anti-choice protesters were beginning to gather in the walkway- to the clinic. As soon as a large group had gathered, one of the leaders, a man, signalled them and they all sat down in front of me. They began to sing and pray in unison. As other pro-choice demonstrators arrived, they were prevented from joining our group by this group of blockaders. At a signal from the leader they all stood and forcibly pushed pro-choicers (and at least one patient) back while calling them "baby killers" and murderers and "pro-aborts".

As the day wore on the tension increased. I was pressed against the front row of anti-choice demonstrators, and one young man in particular started accusing me of things and verbally attacking me personally. He called me a selfish yuppie who wanted to live life without responsibility as well as a "baby killer". This especially hurt me because I had fairly recently nursed my mother and my best friend during their terminal illnesses. They

had both died of cancer 6 years apart. My first thought was to explain to this man that his accusation wasn't true, but I could feel the tears about to come up. Then I looked into his face, and saw that he wasn't seeing me as human being, but a target for his anger. I looked around, and saw others on his side following his example, and people on my side were responding. Some with debate, some with anger. It seemed to me that this kind of verbal abuse of us was a tactic that helped to escalate the tension. Another pro-choice demonstrator attempted to join our group by the door to the clinic during all this. One of the anti-choice protesters began kicking and stomping on our feet. He stomped on mine and my toes were black and blue for a year. Some people from our side started kicking back. It was very scary and certainly not "non-violent". Eventually the police forced their way through the mob and took away a couple demonstrators from each side.

After this, the police brought a patient up to the line of anti-choice protesters to see if they could get her through. Anti-choicers on the sidelines were yelling at her, and she looked scared. The anti-choice folks in the walkway were sitting on the ground again singing and praying. When it became clear that they were not going to let her through, arrests began. The arrests took several hours. The police finally got to us and we left peacefully.

After all this I was exhausted emotionally and physically. I can only imagine what it must be like for a patient who has made a difficult decision when she faces this chaos. Maybe she's only able to get to the clinic on a Saturday because she works. Maybe she is near the end of her first trimester because she wasn't certain she was pregnant. Maybe she's been sexually abused or raped. In these situations a person's individual humanity is lost, and a crowd mentality take over. It's ugly on both sides.

My other experiences at clinic blockades were basically the same. The feeling of shock and assault never altered. I've seen patients reduced to tears by the assault. They leave and both sides claim victory—one says another baby was saved; the other claims that she went to another clinic.

I just don't think that the debate about abortion should take place directly outside the clinics. It isn't fair to the patients. It's illegal to interfere with patients going into a hospital why should any medical facility be any different?

• • • •

LETTER—C76

You requested information about the experience of our client, the [ ] Womens Health Center, and its patients with anti-abortion demonstrators. As I mentioned to you, members of my firm were present throughout all of the demonstrations.

The demonstrations were orchestrated by a small cadre of people determined to disrupt the services provided at our client's full service health facility. Since those attempts were unsuccessful, the demonstrators increased the level of their actions with more inhuman and illegal conduct.

On several occasions, the demonstrators barricaded the Health Center in unsuccessful attempts to prevent its operation. In addition, patients were accosted and subjected to obscenities being screamed at them. [ ] is very fortunate to have a responsive police force and supportive community, which greatly assisted the efforts to continue providing essential medical services.

There are many instances that I recall involving offensive actions by the demonstrators. These include attacking young children who came to the Health Center with their parents, attacking patients entering the Health Center, and assaulting [ ] police officers. The demonstrators have no regard for other people's dignity or the law and have refused to comply with numerous court orders including the imposition of fines and other penalties.

The situation peaked two years ago when the demonstrators invaded the Health Center and entered the examination room of a patient undergoing advanced invasive cancer testing. In addition, during the same time period, the demonstrators picketed a judge's home and made anti-semitic comments to him in open court. These actions were orchestrated by several professional demonstrators who came from out of state. They have been arrested numerous times over the last few years and, on this occasion, they spent several months in jail for their refusal to identify themselves to the court. The State of [ ] incurred a substantial expense.

These extraordinarily offensive actions brought an even stronger public reaction against the demonstrations. While we expect weekly picketing to continue, the public support for our client appears to have quelled the repeated illegal and offensive actions of the demonstrators.

LETTER—C77

For the past couple of years I have been a Pro-Choice activist and have witnessed numerous examples of violent behavior by the Operation Rescue faction of the Anti-choice movement.

One of the more horrific examples of the OR's harassment of women seeking health-care services occurred at the Westmoreland clinic. While Pro-Choice activists attempted to escort a patient through the human "corridor" and into the blockaded clinic, OR members attempted to physically prevent the woman from entering the clinic. The mauled and pawed at her, finally managing to get their hands on her and lift her above the crowd with their outstretched arms. Their goal was to raise her above the level of the chain-link fence and deposit her on the other side of it.

As you can imagine, the patient was wailing and shrieking during this attack on her body and Pro-choice activists struggled to pull the OR members off of her and protect her from the mob. I witnessed this from a distance of about twenty-five feet and was unable to determine what the outcome was. However, I will never forget the sound of the woman's screams as she was physically molested, stripped of her dignity, and denied her constitutional rights.

• • • •

LETTER—C79

For 3 years I had been a volunteer clinic escort. In those 3 years I have seen much harrassement, but I will never forget the summer of 1989. That summer operation rescue bombared our clinic many times. I was standing near the entrance of the clinic, helping people coming into the clinic from the street. I was face to face with the anti protesters. From experience, I was used to their hatred and intimidation. A man was standing by the fence, with 2 young children. The girl was maybe 6 and the boy no older than eight. They stood on either side of this man, just watching everything. I assumed the man was their father. I was wearing a hat for protection from the sun and had taken it off to wipe my forehead. The man yelled out, to me and especially his children, "See that red head? If you ever see her on the street you can kill her, because she's no good and she kills babies." I'll never forget those words. He said it with such force, that for a moment I was scared. I had never been threatned before and I was nervous. In that one moment this man was teaching his children to hate and kill anyone who differs from their opinion. As my knees shook, I stood there, knowing there was nothing I could say.

• • • •

LETTER—C80

I am writing you as both a pro-choice activist and as Coordinator of [ ] RCAR. My experiences with "clinic defense" have been in the official capacity as Coordinator.

In [ ], we participate in what RCAR calls *Operation Respect.* I am including our guidelines which are stricter than most. And, we try as much as possible to strictly enforce these guidelines. Our presence at clinics is silent, peaceful and supportive. Therefore, we do not actually "defend" clinics, but offer support to clinic defenders and our hope is to show the defenders, the women patients and the police that there is another religious viewpoint regarding abortion.

However, even though we do not do direct clinic defense, we are frequently targeted because we hold "Prayerfully Pro-Choice" signs and this seem to irritate Operation Rescue and other clinic blockaders to the extreme.

The really physical incidents that I've experienced are as follows: 1) A woman holding a very large crucifix (about 4' high) repeatedly spat in my face, on my shoes and then began waving the crucifix at me, as if to hit me; 2) A man in army fatigues (boots and all) blocked me and stood with his face in mine, repeatedly cursing me. When I reminded him that there were about 150 policemen around us, he gave me the finger and backed off; 3) I was surrounded by a group of about 30 people and not allowed to move down the street. One woman told me I should get out. It took me a minute to realize what was going on and I began to panic a bit when I realized they were moving in tighter, and I couldn't move. I kept saying "Excuse me, could you let me through", but it wasn't until I began yelling it and some police on horseback began moving in our direction that they began to move away; 4) Walking down the street with three middle-aged Methodist women, all of us holding the signs and a large church banner, we were followed by four

anti-choice protesters and called "witches, lesbians and whores" and then told "you sleep with every man in town and then kill your babies". One of the men who was the most vocal, came up behind one of the women and was yelling in her ear. I kept telling the women to ignore him and keep walking. Finally, a mounted policeman turned his horse around and stopped the anti-choice group and instructed them to walk twenty feet behind us; 5) While giving a press conference a man began swinging his sign at me and ended up hitting a woman who stood between us (this I have on tape).

The majority of the abuse I have received has been verbal. I am of course, called a whore, a slut, a baby killer, and satanist; I am told I am going to hell; I have been called anti-christ. I have been told "What if I kill your daughter, then how would you feel?". (Since I frequently mention my children when I speak and debate, I don't necessarily take this question as purely hypothetical).

I understand that this is an emotional issue and that people will do and say things they wouldn't do and say otherwise, but as a Christian and as a Methodist, I am appalled by the behavior of those who would claim to be my Christian brothers and sisters in other circumstances. I see absolutely nothing Christian in the clinic blockades, the name calling and the physical threats that the anti-choice protesters use routinely to instill fear into those who are pro-choice. They are increasingly desperate when they cannot convince through dialogue and they seem willing to use any means necessary, including physical violence, to shut down the dialogue altogether.

For me and RCAR, this is a "Freedom of Religion" issue, and it is reminiscent of the crusades. Clinic blockaders not only stop a woman from being able to exercise her constitutional rights, they also impose upon that woman a particular religious point of view and deny her the authority over her own soul.

I hope that you can use this.

• • • •

(22)

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IN THE

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OCTOBER TERM, 1990

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Petitioners,

v.

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NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE NATIONAL ABORTION FEDERATION AND PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE NATIONAL ABORTION FEDERATION AND PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The National Abortion Federation ("NAF") and Planned Parenthood Federation of America, Inc. ("PPFA") submit this brief in support of respondents.[1] NAF, a not-for-profit professional association, was founded in 1977 and is composed primarily of clinics and physicians' offices providing reproductive health services, including abortion. Currently, NAF members include 260 abortion providers operating in 45 states, the District of

[1] The parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court.

Columbia, Puerto Rico and Canada.[2] NAF's primary objective is to unite providers of abortion services into a professional community dedicated to quality care. NAF provides professional standards, guidelines, training and education to its members and serves as a clearinghouse for information and advice to abortion-service professionals and the general public.

PPFA, a not-for-profit corporation organized in 1922, is the leading national voluntary public health organization in the field of family planning. Currently PPFA has 170 affiliates in 49 states operating approximately 900 family planning clinics.[3] Thirty-three PPFA affiliates are also members of NAF. PPFA affiliates offer a wide range of services relating to reproductive health, including abortion. Fifty-nine PPFA clinics offer abortion services as part of their program, and all PPFA affiliates that do not perform abortions themselves offer counseling and referral for such services.[4]

NAF members and PPFA affiliates are the targets of the nationwide campaign of antiabortion violence and intimidation typified by this case. *Amici* thus have a special concern that the Court be fully informed as to the scope and nature of this campaign, because these facts demonstrate how closely this campaign mirrors the campaign of violence and harassment which gave rise to 42 U.S.C. § 1985(3).

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[2] Five of the original plaintiffs in this action are NAF members: the NOVA Women's Medical Center, Planned Parenthood of Metropolitan Washington, D.C., Inc., Prince William Women's Clinic, Hillcrest Women's Surgi-Center and Metropolitan Family Planning Institute.

[3] One respondent is a PPFA affiliate: Planned Parenthood of Metropolitan Washington, D.C., Inc.

[4] An additional 15 PPFA clinics expect to offer abortion services by the end of 1991.

STATEMENT OF FACTS

Amici curiae adopt by reference the Statement of Facts set forth in the Brief for Respondents filed with this Court.

SUMMARY OF ARGUMENT

Over the past decade, our nation has witnessed a campaign operating outside the law with the self-proclaimed purpose of preventing women from exercising their constitutional right of reproductive choice. A factual overview of this campaign shows a nationwide pattern of acts of violence and intimidation targeting the providers of abortions and the women who seek reproductive health services from them. This overview also shows that interstate travel by women seeking services, and by physicians providing services, is an integral part of the abortion service delivery system.

The situation presented today is a virtual mirror image of the situation in our country that prompted the enactment of 42 U.S.C. § 1985(3). Both are characterized by mob violence aimed at preventing a class of citizens from exercising a constitutional right by intimidating those citizens and those who assist them in the exercise of the right. In both, interstate travel is frequently a component of the exercise of the right, and thus also a victim of the intimidation. Therefore, § 1985(3) should be available as a remedy in this case.

ARGUMENT

I. THERE IS A NATIONWIDE CAMPAIGN OF VIOLENCE AND INTIMIDATION AIMED AT PREVENTING WOMEN FROM EXERCISING THEIR RIGHT OF REPRODUCTIVE CHOICE

Between 1977 and 1990, 829 acts of antiabortion violence were reported to NAF: 34 clinics were bombed, 52 clinics were the targets of arson, and 43 more clinics were the targets of attempted bombings or arson. In the first three months of 1991, two more clinics were firebombed and two others had been destroyed or damaged by arson.[5] These activities took place in 30 states as well as the District of Columbia and Canada.

In addition, there were 266 clinic invasions, 269 incidents of vandalism, 64 assaults and batteries, 77 death threats, 2 kidnappings and 22 burglaries.[6] More than half of all acts of extreme violence committed against abortion providers were in the form of arson (39 percent) or bombing (21 percent). Grimes, Forrest, Kirkman & Radford, *An Epidemic of Anti-Abortion Violence in the United States* 8 (1991) ("*Epidemic*").[7] While the

[5] Information concerning these incidents is set forth in NAF's publications: *Incidents of Violence & Disruption Against Abortion Providers* ("*Incidents*") at 1 and *ANTIABORTION VIOLENCE: Incidents of Arsons, Bombings, and Attempts, 1977-1990*, and in letters from NAF to its members, copies of which are being lodged with the Clerk of the Court. NAF regularly collects and publishes these statistics in its capacity as a clearinghouse for information regarding abortion.

[6] *See Incidents* at 1. Many of these tactics are openly advocated by Joseph Scheidler, one of the leaders of the militant antiabortion movement, in his book *Closed: 99 Ways to Stop Abortion* (1985). *See, e.g.*, chapter 37 (Picket the Abortionists' Homes); chapter 53 (Use Private Detectives); chapter 57 (Conduct a Blitz (clinic invasion)); chapter 60 (Get Information from License Plates); chapter 86 (Special Clinic Closing Programs: Project Jericho, Three Month Blitz, and Others).

[7] A copy of *Epidemic* is being lodged with the Clerk of the Court.

total cost of this reign of terror is difficult to determine, it is estimated that antiabortion violence has resulted in $7.6 million in direct damages. *Id.* at 12. This figure does not even include the number of facilities that have been totally destroyed by antiabortion violence. *Id.* The violence has escalated to such a degree across the nation that Congress held hearings on the subject of violence against abortion clinics. *See Abortion Clinic Violence: Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. and 2d Sess. (1985 and 1986) ("*Hearings*").

Since 1987, this campaign has increasingly focused on tactics advocated by Operation Rescue and other militant antiabortion organizations such as the Lambs of Christ: to physically block the doors of clinics to deny access to patients and staff. *Amici* describe *infra* several examples of these blockades to demonstrate that they have "the same aim as the more obviously violent bombings and arson: to shut down the clinics and prevent women from entering them. . . . These tactics are not simple expressions of opinion. They are part of concerted plans to intimidate women and close abortion and reproductive health clinics." *Hearings* at 174 (testimony of Professor Rhonda Copelon, Associate Professor, CUNY Law School at Queens College, New York). Between January 1987 and December 1990, 419 clinic blockades were reported to NAF, resulting in over 26,000 arrests. *Incidents* at 2. The blockades have been accompanied by clinic invasions,[8] destruction of property,[9] and trampling of police lines and barricades.[10] They have thrust a massive burden on

[8] *See Cousins* v. *Terry*, 721 F. Supp. 426, 430-31 (N.D.N.Y. 1989).

[9] *See Town of West Hartford* v. *Operation Rescue*, No. H-89-100, slip op. at 3 (D. Conn. Sept. 20, 1989), *rev'd on other grounds*, 915 F.2d 92 (2d Cir. 1990).

[10] *See NOW* v. *Operation Rescue*, No. 89-2968-LFO, slip op. at 7-8 (D.D.C. Nov. 8, 1989), Memorandum of Findings of Fact and Conclusions of Law.

law enforcement personnel and on the courts.[11] The examples discussed *infra* also demonstrate the nexus between abortion and the constitutional right to travel, and show how the blockades interfere with this nexus.

An increasingly large percentage of women seeking abortions are forced to cross state lines to receive services. Across the country, there is also a growing number of medical professionals who travel interstate to perform abortions. According to a recent survey conducted by The Alan Guttmacher Institute, an average of 26 percent of the women in Arkansas, Idaho, Indiana, Kentucky, Mississippi, South Carolina, South Dakota, Utah, West Virginia and Wyoming traveled to other states for abortion services. Henshaw & Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 102, 105 (May/June 1990) ("*Abortion Services 1987-88*"). The survey also showed that the number of doctors and medical facilities in rural areas willing to accept abortion patients dropped 51 percent from 1977 through 1988. *Id.* at 107. Large numbers of out-of-state women also obtain abortions in Delaware, Kansas, North Dakota, New Hampshire, Rhode Island, Vermont and the District of Columbia. *Id.* at 105.

This high volume of interstate travel is caused by several factors. One reason is the severe shortage of physicians willing to perform abortion procedures. In 1990, NAF and the American College of Obstetricians

[11] For example, civil injunctive actions against Operation Rescue have been filed in California, Connecticut, the District of Columbia, Indiana, Maryland, Massachusetts, Nevada, New Hampshire, New York (Albany, Binghamton, Buffalo and New York City), Ohio, Pennsylvania, Virginia and Washington.

[12] The nexus between abortion and travel was recognized in *Doe v. Bolton*, 410 U.S. 179, 200 (1973), which struck down a statute that interfered both with a woman's right to travel interstate to obtain abortion services and the rights of medical providers to deliver such services to non-residents.

and Gynecologists ("ACOG") held a national symposium on the increasing shortage of physicians providing abortion services in the United States. One of the key findings of the symposium was that antiabortion harassment and violence directed toward providers adversely affected physicians' willingness to participate in abortion practice. NAF & ACOG, *Who Will Provide Abortions? Ensuring the Availability of Qualified Practitioners* at 16 (1990) ("*Symposium Findings*").[13] The decrease in the number of physicians providing abortion services is particularly troublesome given that "83 percent of the counties in the United States have no abortion provider."[14] *Id.* at 4.

In South Dakota, for example, there is only one physician, Buck Williams, providing elective abortions for the entire state. Gorney, *Abortion in the Heartland*, Wash. Post, Oct. 2, 1990 (Health), at Z12 ("*Heartland*"). "Women come to Williams's office from five states and sometimes Canada; they come by bus and by car, through rainstorms and Dakota blizzards, some of them driving themselves the six hours it takes to reach Sioux Falls from Rapid City." *Id.* Long distance trips can pose a grave danger to women's health because of the difficulty in rapid diagnosis and treatment of medical complications. *Abortion Services 1987-88* at 105.

Interstate travel is also necessitated by the type of procedure needed by the patient. For example, only one physician in Idaho performs abortions past 12 weeks of

[13] A copy of *Symposium Findings* is being lodged with the Clerk of the Court.

[14] The shortage of providers in turn leads to increased travel by physicians and makes that travel the target of antiabortion violence. *See, e.g.*, Seigel, *Abortion foes change tactics*, Chicago Tribune, Apr. 26, 1991, at 1, col. 1 ("Anti-abortion activists from six states, all of them veterans at blocking abortion clinics, . . . tried to detain a doctor en route to perform abortions by chaining themselves to his car at an Illinois tollway oasis in Lake Forest.").

pregnancy, which causes many women to travel to Portland, Oregon. *Heartland* at Z13. Similarly, because there are few providers of second trimester abortions in Alaska, a woman who requires this procedure in all likelihood must travel out of state to Seattle. *Abortion: MDs who do them and those who won't*, American Medical News, Dec. 8, 1989, at 1, col. 1. At the Hope Clinic for Women, Ltd. in Granite City, Illinois, which performs second trimester abortions, 32 percent of the patients are non-residents from the states of Arkansas, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Tennessee and Wisconsin.

Even if a woman lives in a state where there is a physician who performs abortions and who is willing and able to perform the type of procedure that she needs, she may nevertheless elect to travel out of state to a clinic to maintain the confidentiality which sometimes is compromised in a private physician's office or a hospital. "Clinics develop ways of dealing with the telephone public, and people at large, that guarantee anonymity." *Heartland* at Z15.[15]

More recently, interstate travel and abortion have become inextricably intertwined because of the growing disparity in the abortion laws of each state. States have begun to enact a wide variety of laws regulating abortion. For example, many states have enacted parental consent notification laws.[16] Many minors, for various reasons, have great personal difficulty and anxiety in attempting to comply with the laws. *See Hodgson* v.

[15] To the extent that the physician shortage increases and clinics are closed, maintaining one's privacy becomes more difficult because of the length of time a woman must spend away from work and home obtaining an abortion. *Abortion Services 1987-88* at 105.

[16] Currently 16 states have such laws in effect: Alabama, Arkansas, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, North Dakota, Ohio, Rhode Island, South Carolina, West Virginia and Wyoming.

Minnesota, 648 F. Supp. 756, 766-68 (D. Minn. 1986), *rev'd on other grounds*, 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 110 S. Ct. 2926 (1990). Thus, it is increasingly likely that minors will travel interstate to obtain abortions. *Id.* at 767. Other restrictions have similar effects on adults. *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 3211 (banning abortions after 24 weeks).

The destructive, health-threatening effects of the campaign of clinic violence have been felt across the nation. *Amici* have gathered a representative sampling of these episodes to illustrate their disruptive consequences and to show in detail the adverse effects on provision of reproductive health services and the threat to women's health. These examples demonstrate that the facts of this case are neither isolated nor an effort to communicate a political message. Rather, petitioners' conduct is part of a campaign of violence and harassment intended, just as in the post-civil war era, to instill fear, interfere with travel and prevent the exercise of constitutional rights.

A. Southern Tier Women's Services—Vestal, New York

Southern Tier Women's Services, a member of *amicus* NAF, provides routine gynecological services and abortion. Other than Southern Tier, only one physician performs abortions in the entire southwestern region of New York state. On average, Southern Tier performs 50 abortions weekly. Women from within the state may travel 175 miles or more to be treated at Southern Tier. Twenty percent of Southern Tier's patients come from Pennsylvania.

For a three-year period in the late 1980's, Operation Rescue and its founder, Randall Terry, recruited anti-abortion protesters nationwide for "rescue" efforts at Southern Tier. During these blockades, the protesters, sometimes numbering in the hundreds, would: invade the office of Southern Tier; barricade themselves in pro-

cedure rooms; chain themselves together and to furniture or cement blocks; importune patients not to "murder" their babies; obstruct the clinic parking lot and entrances; glue the door locks; deface clinic property with antiabortion slogans; and refuse to leave until forced to do so by the police. *See, e.g., Cousins* v. *Terry*, 721 F. Supp. 426, 430-31 (N.D.N.Y. 1989). During each blockade, Southern Tier would be shut down for several hours and women would be prevented from obtaining medical services. *Id.* at 431-32. Many women who cancelled appointments during blockades failed to reschedule.

Southern Tier eventually sought injunctive relief against Operation Rescue pursuant to 42 U.S.C. § 1985(3) and various state law causes of action, and obtained a permanent injunction pursuant to § 1985(3). *Cousins* v. *Terry*, No. 89-CV-973 (N.D.N.Y. Mar. 27, 1990), *appeal dismissed*, No. 90-7353 (2d Cir. Apr. 23, 1990). Trespass and blockade actions have now ceased at Southern Tier Women's Services and women are able to receive medical treatment without problems.

B. The Atlanta SurgiCenter—Atlanta, Georgia

The Atlanta SurgiCenter is a member of *amicus* NAF. Abortion services, including two-day laminaria procedures, comprise 90 percent of the Center's activity. The Center performs approximately 75 abortions weekly. Last year, eight percent of the patients traveled from North Carolina, South Carolina, Tennessee, Florida, Alabama and Kentucky to obtain abortions at the Center.

During the summer of 1988, the SurgiCenter was blockaded eight times. *See generally* Yancey, *69 Are Arrested While Over 300 Protest Abortion*, Atlanta Journal Constitution, Aug. 7, 1988, at 1A, 15A. Center personnel soon learned that they had to devise extreme and "rescue"-specific security measures. Staff began requiring patients to arrive by 5:30 a.m. in order to get inside before the blockaders' usual 6:30 a.m. assembly.

Names of scheduled patients would appear on a prearranged "check list" and no patient would be permitted more than one or two visitors.[17] Even with these procedures in place, staff operated in the constant fear that imposters would nevertheless get inside and begin harassing or assailing patients and staff.

Late arriving patients could not be guaranteed ingress until the blockade was ended. Often, protesters would charge the police lines and frighten off the women seeking to enter. On more than one occasion, a patient in the second day of a laminaria procedure would have to return to her hotel and be delayed in completing this critical medical treatment.[18] Moreover, those already inside could not rely on immediately obtaining services.

On some days, patients would be able to enter the clinic only with the help of police and escorts. However, this would often be accomplished only after the women's faces were covered with sheets, sweaters or umbrellas to shield their identity. The women then were physically lifted by the escorts over the protesters' prone bodies into a zone of safety. Although over 400 arrests were made during the blockades, each time they occurred the SurgiCenter would be unable to operate for nearly the full day.

C. The Elizabeth Campbell Center—Cincinnati, Ohio

The Center is a full-service reproductive health care clinic operated by Planned Parenthood of Cincinnati, Ohio, an affiliate of *amicus* PPFA. The Center is one of a very few non-profit, public providers of abortions in

[17] Several thousand dollars of the Center's budget went towards hiring extra security guards during the siege. Moreover, plate glass windows which had been destroyed by cement block-throwing protesters had to be replaced with impact-resistant plastic.

[18] If the second day of a laminaria procedure is not done as scheduled, the patient is at increased risk for infection, painful miscarriage and psychological complications. *Cf. Roe* v. *Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989).

the Metropolitan Cincinnati area. It performs approximately 3000 abortions yearly. Nearly 25 percent of the Center's patients are Medicaid-eligible and 12 percent of the clinic's abortion patients are residents of other states such as Illinois, Indiana, Kentucky and West Virginia.

The Center has been the target of antiabortion activity for over a decade. *See 21 abortion foes arrested in protest at Cincy clinic*, The Plain Dealer, June 29, 1986, at 8B, col. 2. Following a 1985 firebombing which destroyed the original clinic, operations were moved to another location where the Center then became the object of frequent hostile and mass picketing.[19] Indeed, the activities of the antiabortion protesters were so abusive that Planned Parenthood, along with tenants of a neighboring apartment building, obtained a state court injunction against the protesters. *Planned Parenthood Ass'n of Cincinnati* v. *Project Jericho*, No. A8602417 (Ct. of Common Pleas, Hamilton Cty., Ohio June 20, 1986). Despite the injunction, defendants repeatedly violated its terms and received numerous contempt citations.[20]

Moreover, the protesters began actual blockades of the Center. On two occasions, they blocked the clinic doors and prevented patients, staff and escorts from entering or leaving the building for several hours.[21] During one

[19] The antiabortion activist who was responsible for this bombing declared himself a "member of the army of God for the unborn," had been arrested in several Cincinnati area abortion protests and admitted to traveling around the country to participate in demonstrations at abortion clinics. *See Man pleads guilty to firebombing clinic*, The Plain Dealer, Sept. 25, 1990, at 4B, col. 2.

[20] After several years of litigation, the Ohio Supreme Court finally upheld findings of contempt against defendants. *Planned Parenthood Ass'n of Cincinnati* v. *Project Jericho*, 52 Ohio St. 3d 56, 556 N.E.2d 157 (1990).

[21] In 1988, three years after the firebombing, the Center moved into its current fortified structure in a mixed residential/commercial

blockade, clinic personnel attempted to shield arriving patients from the protesters by placing them in nearby automobiles. However, the protesters surrounded the cars and rocked them. The terrified patients, now trapped in the cars, tried to cover their faces by putting their coats over their heads and over the car windows.

D. Planned Parenthood of St. Paul, Minnesota

This clinic, affiliated with *amicus* PPFA, began providing abortion-related services in 1977. The clinic performs approximately 2200 to 2500 abortions per year. Five percent of these patients come from outside the state and primarily from Wisconsin. Since opening, the clinic has been the object of arson four times, bombing five times and regular picketing. *See* McEnroe, *48 arrested during anti-abortion rally*, Saint Paul Pioneer Press, June 23, 1990, at 10A, col. 4 ("Pioneer Press"). In this same period, clinic personnel have been constantly threatened with death and kidnapping of their children. Blockade activity began nine years ago.

In a recent episode, approximately 150 protesters from an antiabortion organization known as Pro-Life Action Ministries staged a day-long blockade at the clinic which resulted in the arrest of nearly 50 protesters. *See* Hopfensperger, *Police arrest 50 abortion foes*, Star Tribune, June 23, 1990, at 1A, col. 1 ("Star Tribune"); Pioneer Press at 7A.

Blockade organizers massed their forces in neighboring Minneapolis and then bussed the protesters to the St. Paul clinic. Upon disembarking from the bus, the demonstrators began trespassing on the clinic's private

neighborhood. A considerable proportion of the construction budget was devoted to securing the building against arson, invasions and other acts of terror. Even improved security measures, however, have not been sufficient to prevent the protesters from blockading the Center at its new location.

property and blocked the doors. As the police made arrests, new protesters arrived in waves to take the places of those removed. Notwithstanding police presence, patients were unable to enter the building during the blockade.

The level of aggression heightened when the physician arrived. The protesters assailed him with shouts of "here comes the butcher" and "don't let the killer in." As the police attempted to escort the physician into the building, the crowd surged forward and injured several police officers and a Planned Parenthood staff member. *See* Star Tribune at 8A, col. 1. From 9:00 a.m., when the blockade began, until 4:00 p.m., when the last protesters left the scene, all normal business of the clinic was halted.

E. Vermont Women's Health Center—Burlington, Vermont

The Vermont Women's Health Center is a small, non-profit clinic and member of *amicus* NAF. It provides a broad range of obstetrical and gynecological health services, 20 percent of which are abortion-related. The next closest public provider of abortions is over 50 miles away. In 1990, the Center performed approximately 25 abortions weekly. Twenty to 30 percent of those patients came from outside Vermont, principally from upstate New York, New Hampshire, Massachusetts and Maine.

In October 1989, the Center received an anonymous phone call to "shut down because Operation Rescue [is] coming at noon." When Operation Rescue arrived, three of its members, posing as legitimate patients, gained entry into the clinic. Immediately thereafter, a dump truck arrived, blocked the driveway and unloaded 54 shouting protesters who invaded the building.

They knocked the clinic director to the floor and screamed epithets such as "blood is dripping from your hands" and "Queen Satan, Leader of the baby killers." They prevented the director from reaching a telephone

until they were sure the lines had been cut. They joined together with bicycle locks and then chained themselves to the clinic's furniture and doors.

Police officers were sent to handle this massive and violent confrontation. Two of the officers had to break into the clinic to gain access and were physically assaulted and injured when the protesters attempted to block them from entering. *See* Derby, *54 abortion foes face charges of trespassing*, Burlington Free Press, Oct. 25, 1989, at 3A. Because they were so outnumbered by the protesters, the officers were unable to stop new "rescuers" from entering the building. Moreover, the fire department had to come in to cut open the locks on the protesters one by one.

The Center was effectively shut down for more than 6 hours that day and none of the 13 patients who had come for medical treatment was able to obtain it. Some of the women coming for routine gynecological services have never returned to the Center, citing fear of the protesters as their reason for cancelling appointments.

Since the October 1989 invasion, the Center has been the object of four more blockades. *See* Derby, *Abortion protesters besiege health center*, Burlington Free Press, Feb. 21, 1990, at 1A. Each time, the protesters were successful in halting normal clinic operations for three- to four-hour periods.[22]

These repeated massive and intimidating actions by antiabortion forces have deeply affected the Center's

[22] As a direct result of these protest activities, the Center has had to divert funds intended for other purposes into self-defense initiatives. Thus, extra expenditures have been made for placing new locks on every internal and external entry point. Bars now cover the windows, a fence was erected and a new entrance was created to allow more privacy for entering patients. Further, monies were expended to repair physical damage done to the building by the invaders. *See* Derby, *Clinic steps up security to guard against protesters*, Burlington Free Press, Oct. 27, 1989, at 1A.

staff. A therapist has been called to staff meetings for counselling and, from time to time, self-defense workshops are conducted. The clinic's business manager, a long-term employee, has resigned at the urging of a spouse who feared for her life.

F. Portland Feminist Women's Health Center—Portland, Oregon

This full-service, non-profit reproductive health clinic is a member of *amicus* NAF and one of four public providers of abortion in the Portland, Oregon metropolitan area. The Portland Feminist Women's Health Center ("PFWHC") performs approximately 32 abortions weekly for women of all income ranges, including those who are Medicaid-eligible. Seven to 10 percent of abortion patients travel to the Center from the states of Washington, Idaho, Nevada and California.

Starting in 1984, an antiabortion organization known as Advocates For Life began picketing and blocking the entrances to PFWHC with as many as 160 demonstrators. Frequently, the protesters chased after entering patients, bumping and grabbing them in an effort to block access. They yelled and screamed menacing epithets and tried to press antiabortion literature on patients and personnel who clearly did not want it. In 1985, PFWHC's windows were broken, its telephone and electric power lines were cut and its electric power meters were broken. Further, in 1985, a medical emergency arose which required a patient to be transferred to a hospital. As ambulance attendants attempted to place the patient in their vehicle, the protesters shouted ugly insults at the woman and formed a gauntlet around the attendants which impeded their movement. *See Portland Feminist Women's Health Center* v. *Advocates For Life, Inc.*, No. 86-559-DA, slip op. at 3-5 (D. Or. May 22, 1986).[23] In 1986, PFWHC obtained a federal district

[23] By the end of 1985, half of PFWHC's staff had resigned. Three people, including the Executive Director and the Clinic Administrator, cited acute stress from these violent protests as their reasons for leaving the Center. Moreover, in 1986, the clinic lost more than one third of patients desiring abortions. The clinic also was dropped by its regular insurer and forced into a high-risk pool with a rate increase of 78 percent. Rubenstein, *Abortion protesters continue siege*, The Oregonian, May 28, 1990, at D6.

court preliminary injunctive order on claims of 42 U.S.C. § 1985(3) and state law violations. Order of Preliminary Injunction (D. Or. June 9, 1986).

Defendants repeatedly violated the terms of the order. And, when PFWHC moved to a location less amenable to widescale protests, the demonstrators began to engage in "rescues."[24] From July 1989 to July 1990, PFWHC experienced four blockades by antiabortion forces. Some of these protests have been extremely violent. Rubenstein, *Abortion protesters continue siege*, The Oregonian, May 28, 1990, at D1, D6. During one of the actions, a patient who merely wanted a pregnancy test was prevented from entering the Center. During another, a woman having post-abortion complications was denied ingress. In each blockade, PFWHC was shut down for four to six hours. Those patients who could not go home or elsewhere to wait until they could enter the clinic safely were put into cars and driven around the city for hours.

After a jury trial, PFWHC was awarded damages for the injuries caused by the protests. Moreover, the district court granted plaintiffs' request for a permanent injunction based on defendants' violations of 42 U.S.C. § 1985(3) and various state laws. *Portland Feminist Women's Health Center* v. *Advocates For Life, Inc.*, No. 86-559-FR (D. Or. Mar. 5, 1991) (1991 U.S. Dist. LEXIS 2867).

[24] PFWHC's relocation took five years because landlords throughout the city who feared antiabortion protests refused the Center tenancy. *Id.*

II. THE VIOLENT CAMPAIGN AGAINST WOMEN AND ABORTION PROVIDERS CLOSELY MIRRORS THE VIOLENT CAMPAIGN AGAINST AFRICAN AMERICANS AND THEIR SUPPORTERS WHICH GAVE RISE TO 42 U.S.C. § 1985(3)

A review of the legislative history of § 1985(3) shows that it was enacted in response to the fanaticism of the Ku Klux Klan ("Klan"), whose goal "was the overthrow of the reconstruction policy of Congress and the disenfranchisement of the negro." S. Rep. No. 1, 42d Cong., 1st Sess. VII (1871). The Klan unleashed a campaign of terror intended to "trample into the dust" the newly-acquired constitutional rights of African Americans.[25] The Klan aimed its terrorism not just at African Americans, but also at those who sought to assist them: "Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the Negro." *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. 825, 836 (1983).

Congressional testimony also revealed the Klan was composed of a number of groups which took on different names such as the Invisible Empire, the White Brotherhood and the Constitutional Union Guard. However, the groups were subparts of the Klan, united in the common purpose of extinguishing the hard-fought rights of newly-enfranchised African Americans and their supporters. S. Rep. No. 1, 42d Cong., 1st Sess. VII (1871).

As the discussion in Part I shows, the extremism of the militant antiabortion movement closely parallels the fanaticism of the Klan. Operation Rescue and other groups seek to "trample into the dust" the newly-acquired constitutional right of women to secure abortion, as well as their right to travel interstate to do so. *See* Part III, *infra*. As with the Klan, antiabortion militants bear

[25] Cong. Globe, 42d Cong., 1st Sess. 517 (1871) (remarks of Rep. Shellabarger).

many names,[26] but are united in their goal to extinguish the constitutional rights of women. And like the Klan, these groups aim their assaults not just at women seeking to exercise their rights, but at providers of abortion services who seek to assist them.[27]

The assaults on persons, property and liberties which characterized the terrorism of the Klan are the mission of Operation Rescue today. As the Klan did not recognize the constitutional rights of African Americans, similarly, Operation Rescue does not recognize the constitutional protection afforded to women under *Roe* v. *Wade*. The tactics of groups such as Operation Rescue are designed to discourage or prevent the exercise of constitutional rights through a campaign of violence and intimidation. Crimes of arson, bombing, property destruction and widespread intimidation are being perpetrated in concert and agreement by the militant antiabortion movement, acting with the common purpose to injure women and the abortion providers who enable the women to exercise their right of reproductive choice. The peril to which Operation Rescue subjects women and providers is highly reminiscent of that to which African Americans and their supporters were subjected.

[26] Some of the various militant antiabortion groups are known as Operation Rescue, Project Rescue, the Pro-Life Action League, the Lambs of Christ and the Victim Souls of the Unborn Christ Child.

[27] One of the Klan's tactics was to descend on the homes of individuals at night to threaten and intimidate them because of their Republican sympathies. S. Rep. No. 1, 42d Cong., 1st Sess. VIII (1871). This tactic is mirrored today by the large number of instances where providers and their families are victims of unlawful and harassing residential picketing. *See Frisby* v. *Schultz*, 487 U.S. 474 (1988).

III. THE CAMPAIGN OF ANTIABORTION VIOLENCE AND HARASSMENT INTERFERES WITH THE RIGHT OF INTERSTATE TRAVEL OF WOMEN AND ABORTION PROVIDERS

As discussed in Part I, *supra*, Operation Rescue engages in disruptive tactics which block the ingress and egress to abortion clinics, threaten the health and well-being of women and providers, and deny women the right to travel interstate for abortions. Petitioners, however, claim that their behavior is beyond the scope of the constitutional protection afforded the right of interstate travel.

In *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), this Court held that in order to constitute a violation of the right to travel, it must be shown that: (1) there was actual or intended interstate travel; (2) the federal right of interstate travel was "*one* of the rights meant to be discriminatorily impaired"; and (3) there was an intent to drive a protected class out of the state *or* to deter members of a protected class from associating with each other. *Id.* at 106 (emphasis added). All these elements are met here.

As is evident from the statistics cited in *Abortion Services 1987-88* and the individual case studies discussed *supra* at 9-17, a great deal of interstate travel is common nationwide in connection with the provision of abortion services. It is equally clear that interstate travel and abortion are permanently and inextricably intertwined due to the decreasing number of providers, the lack of facilities that offer second trimester abortions, and oppressive laws that unduly burden the right of reproductive choice. Therefore, large numbers of women have no choice but to exercise their constitutional right of interstate travel in procuring these medical services.

In addition to the effect that the activities of radical antiabortion groups have had on women traveling interstate for abortion services, antiabortion activists also have directly interfered with the freedom of interstate travel by physicians who provide abortions. As discussed *supra* at 7 n.14, a physician who was traveling along an interstate highway was trapped by a group of militant antiabortion protesters who chained themselves to his car to prevent him from traveling to an abortion clinic in another state. Although the protesters did not physically assault the physician, this incident is otherwise indistinguishable from the conduct which the Court found to violate the right to travel in *Griffin*, 403 U.S. at 90-91, and *United States* v. *Guest*, 383 U.S. 745, 747-48 n.1 (1966).

Petitioners maintain that, because their actions have only an "incidental" effect on women traveling out of state to receive abortion services, the constitutional right to travel is not implicated by their conduct. Brief for Petitioners ("Pet. Br.") at 30. This position is simply unsupported by the facts. Under the standard articulated by the Court in *Griffin*, the requisite intent to violate the right to travel is two-fold: petitioners must intend, as one of their goals, to violate the right to travel, and they must intend to drive out of state those women from other states who cross state lines for abortion services. Both of these intent requirements are met here. By their own admission, petitioners' goal is to stop all abortions. *See* Pet. Br. at 23. Petitioners also state that their actions equally "hinder[] *all* comers, whether from Virginia or from out-of-state." *Id.* at 29 (emphasis in original). *A fortiori*, at least *one* of the intentional purposes of petitioners' actions is to prevent women from traveling into the state to the targeted clinic for abortion services.

To be sure, petitioners' main goal is to interfere with a woman's right to privacy, which includes the decision whether to bear children. *Roe* v. *Wade*, 410 U.S. 113, 153-54 (1973). However, as Professor Copelon noted

in her statement in the Oversight Hearings on abortion clinic violence:

> Many women do travel out of State to obtain abortions, and the avowed purpose of the harassment of the clinics is to stop women from completing their journey or discourage them from even beginning it. This specific intent to interfere with travel is clear in these cases and is articulated by those who undertake the harassment of the clinics.

Hearings at 169.

Likewise, petitioners intend to drive women seeking abortions out of the state. As James X. Dempsey, Assistant Counsel to the Committee, stated at the hearings on clinic violence:

> Because a woman leaves North Carolina, she travels to Norfolk, VA, in order to receive family planning advice or abortion services. She gets to the door of the building and she is told ["]don't enter this building["] by a private person. She turns around, she goes back to North Carolina.
>
> Now, what difference does it make whether she is stopped 5 feet from the door or whether she is stopped on I-95 when she is travelling up there? Wasn't the purpose of the interference to prohibit her making the trip, to turn her around and send her back where she came from?

Id. at 163.

The answer to Mr. Dempsey's question cannot be other than "yes." The purpose of a blockade not only is to impede movement between an automobile and the door of the clinic; it is to discourage women from traveling at all because of the harassment and pandemonium that greet them at the clinic door.[28] While stopping abortion

[28] This Court has previously recognized that the right to travel is implicated by private action which has the effect of discouraging travel by a protected class. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 253 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 300 (1964).

may be Operation Rescue's ultimate goal, it is clear that the primary means to achieve that goal is to stop the large numbers of women who are forced to cross state lines to exercise the right of reproductive choice, as well as the providers who assist them in exercising that right. Under these facts, a constitutional right to travel violation under *Griffin* is more than satisfied.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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INTEREST OF AMICUS

Falls Church, Virginia was the site of Operation Rescue blockades enjoined in this case, and the city participates as *amicus curiae* to urge the Court to affirm the injunction. Operation Rescue repeatedly summoned hundreds of people to Falls Church to mass around Commonwealth Women's Clinic and seal it off, barring women's access to the clinic for abortions or other medical care. Faced with concerted efforts to incapacitate them, the 30-member Falls Church police force cannot secure access to the clinic premises and adjacent public streets. After the entry of the injunction under 42 U.S.C. § 1985(3), however, the illegal blockades stopped. The federal injunction has been critical to effective law enforcement in Falls Church. Operation Rescue is a nationwide effort, and purely local solutions are unrealistic and inappropriate. Injunctions under state law must be litigated on a case-by-case basis, and pertain only to a particular property. Once one clinic is protected, others in the state bear the brunt of the blockades. Moreover, jurisdiction to prosecute persons in contempt of state court injunctions is only state-wide, and many of the blockaders are from out of state.

No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANE BRAY, OPERATION RESCUE, *et al.*
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR FALLS CHURCH, VIRGINIA AMICUS CURIAE IN SUPPORT OF RESPONDENTS

SUMMARY OF ARGUMENT

The City of Falls Church urges this Court to affirm the injunction under 42 U.S.C. §1985(3) to prevent blockades that hinder local police in their ability to protect statutory and constitutional rights of citizens. Despite its best efforts, the police department of Falls Church was prevented by the overwhelming number of

people involved in Operation Rescue from securing state and federal rights for women seeking entrance to the Commonwealth Women's Clinic. The clinic was therefore closed for several hours. Since Operation Rescue tactics are used nationwide, the City believes that it is essential that §1985(3) be used to assist police in ensuring that constitutional and statutory rights are protected fully for women who choose to exercise their constitutional right to abortion.

ARGUMENT

On October 29, 1988, local, county, and state police were temporarily unable to secure the protections of state law to people who sought to use the Commonwealth Women's Clinic in Falls Church City because the Operation Rescue blockade frustrated the efforts of Falls Church police to clear access to the clinic. A similar threat to the effectiveness of state law enforcement would be posed by conspiratorial blockades that purposefully prevented African-American children from attending integrated schools, kept members of a religious

congregation from entering their temple, mosque, or church, or that excluded Hispanic voters from the polls. Suck blockades violate § 1985(3) when carried out by a conspiracy seeking to nullify the constitutional rights of a class by overwhelming the state's ability to enforce its laws to protect the class as it exercises its rights. The role of state law in securing personal liberty and organizing peaceful interaction among individuals cannot be fulfilled when nationwide conspiracies are permitted to deprive state-law protection to certain groups.

The City of Falls Church, Virginia, is an independent city of the second class encompassing but 2.2 square miles with about 9,600 residents. Located on State Route 7 (West Broad Street) in the City is the Commonwealth Women's Clinic; it provides a full range of gynecological and obstetric services for women and it also provides counseling and certain reproductive services for men. The clinic holds itself out as a "pro-choice" clinic and it is commonly known that the clinic will provide first trimester abortions.

Over the past many years, there have been weekly

peaceful picketing of the clinic by persons opposed to abortion; there has also been picketing by persons in support of a woman's right to choose a first trimester abortion. The City takes no position on these respective views. Rather, it simply takes the position that it is the obligation of the City to protect the established rights of the protestors to express their view and to protect the patients of the clinic when they are unlawfully impeded or even prohibited from exercising their federal and state rights to reproductive services. Included as well is the obligation to protect the right of the clinic to operate a lawful medical business.

On many occasions persons opposed to the activity of the clinic have trespassed for the purpose of giving anti-abortion literature to patients considering an abortion. See *Buckley v. City of Falls Church*, 7 Va. App. 32, 371 S.E.2d 827 (1988)(defense of necessity not applicable because reasonable alternative means was available to achieve defendants' purpose of communicating with patients "concerning the impact of an abortion on both the fetus and the patient").

More recently, these activities have escalated to situations where persons opposed to abortions have sought to close the clinic by literally imposing a human blockade. These blockades are often commonly referred to as "rescues" and they are preplanned in relative secret. On the selected day, hundreds of persons arrive at the selected clinic (only the organizers know the exact location until the buses of "rescuers" arrive). These persons follow the instructions of the organizers and, typically, they place themselves at every means of access to the clinic, sit down and lock arms. The police provide warnings and then, working in teams, they arrest, photograph, and carry away the trespassers. There are often so many trespassers that school buses are used in shifts to transport the trespassers to the City's Council Chamber, which is converted to a holding area and magistrate's office for the purpose of booking and setting of bail.

As persons are arrested, others run or crawl from the public sidewalk to take their place. The organizers stay on the public sidewalk in the crowd until the police are

able to identify them and make an arrest for instigating others to trespass. Virginia Code Ann. § 18.2-120 (1988 Repl. Vol.).

The City is rightfully proud of its nationally accredited police department; however, it is admitted that it is a small one with only thirty sworn officers. The City has well-defined contingency plans for these blockades, but it cannot combat effectively the military-style tactics of these blockades. It has always been necessary to rely on mutual aid agreements and to ask for assistance from Arlington, Fairfax, and the State police.

But even with warning, getting these forces to the scene and organizing them in a way that the response can be well-measured and not counterproductive takes hours. Once organized, it further takes hours to remove the trespassers. In short, and despite the City's best efforts, for a substantial period the blockade effectively closes the clinic and women are denied th[illegible] state and federal rights.

But the hindering of the state criminal justice system does not end with the arrest. For example, over 200

arrests were made after the October 29, 1988 blockade. The City prosecutes all misdemeanors through the City Attorney and his part-time assistant. There were so many defendants that the trials had to be consolidated and held at one time. The only available site large enough was the community center gymnasium, which lacked a certain decorum.

It must be noted here that the defendants are charged with misdemeanors. These include trespass (Va. Code § 18.2-119), instigating others to trespass (§ 18.2-120), blocking free passage (§ 18.2-404), and unlawful assembly (§ 18.2-406). As the potential charges are misdemeanors, the City has no practical ability to charge or seek injunctions that they can enforce against persons in other states who may have planned the disturbance; even if the states involved were willing to extradite, the process would consume months. The injunctive powers of Virginia courts end at Virginia boundaries. Activities like Operation Rescue are usually multistate activities and the ability of localities like Falls Church to prevent them is all but non-existent.

Even though many persons participating at the scene were prosecuted after each disturbance, the blockades did not stop. Another occurred on December 6, 1988, and again on August 19, 1989. The City believes that the federal injunction at issue here and its ability to be enforced nationwide using the authority of the federal court was critical in preventing additional blockades.

The City's interest, indeed its duty, to protect the rights of citizens secured by federal, state and local laws was greatly enhanced by the injunction. It is the City's position that it was appropriate and fully consistent with federal law.

As said earlier, the City of Falls Church takes no position on the views of either party regarding abortion. If Falls Church were voluntarily to withhold police protection from women seeking to visit the clinics out of a desire to prevent women from having abortions, the City would have violated the women's constitutional and state-protected rights to gynecological services, including abortion. Where it is a mob, rather than a City, that seeks to deprive its targets of constitutional rights by

hindering and obstructing the City from protecting people exercising those rights, the mob action violates §1985(3). In this case, the Falls Church police did all that they were able to do to secure the protection of state law to plaintiffs in this action as they sought to enter Commonwealth Women's Clinic to receive or render services there. Against the forces of Operation Rescue, however, the City's efforts proved inadequate. The police force (even as supplemented at considerable cost by county and state law enforcement officers) was unable to ensure access to the clinic for many hours, during which several patients were unable to have scheduled abortions or receive even the simplest of gynecological services. Some suffered physical injury, locked captive in cars that could not move through the parking lot, or bunkered inside the clinic from which medical personnel seeking to treat them had been denied access.

There is also the incalculable injury to a woman's sense of well-being when she is forced to see that local law enforcement officials were, even temporarily, unable to protect her rights. It is the duty, and it was the intent

of Congress in 1871, to bring the power of the federal government to bear upon such reprehensible efforts at intimidation, be it against African-Americans seeking the same rights as other citizens or women seeking access to lawful reproductive services. In this particular context, there can be no doubt and no evidence need be offered to prove that the decision of a woman to terminate her pregnancy is painful and very difficult as it takes into account the most personal and deeply felt considerations. It would be unfortunate, at best, if the powers of the federal government were unavailable to prevent those persons who would conspire to take undue advantage of women in these circumstances.

It was only when the federal court in this case entered its injunction under §1985(3) against the blockades and those that would act in furtherance of them that these disturbances ceased. Peaceful Operation Rescue demonstrations protected by the First Amendment continue outside the clinic, but with the support of the federal court injunction, those women who choose to do so are also able to seek services at the

picketed clinics.

The City police were, of course, "unable to prevent the closing of the clinic for more than six hours." *National Organization for Women v. Operation Rescue*, 726 F.Supp. 1483, 1489, n.4. (S.D.N.Y. 1989). Police Lieutenant Gregory King of Falls Church, Virginia, testified that an Operation Rescue leader "told me that the rescue mission would cease if I could guarantee that there would be no more abortions at the clinic that day. And of course I couldn't guarantee those kind of things."[1] He described in detail the hindrance the local and state police departments experience at the hands of Operation Rescue:

> ... We have 30 sworn members. So, what that entails is getting together with four other agencies. I use the Arlington County Sheriff's department, the Arlington County Police Department, the Virginia State Police, and sometimes Virginia Department of Corrections to coordinate the arrest procedures on the scene.

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[1]Lieutenant Gregory King testified at the trial. A transcript of his testimony appears in the record on appeal in the United States Court of Appeals for the Fourth Circuit. Reference to his testimony in the form "App. __" refer to the page in the Court of Appeals Appendix on which the quoted passage appears.

> At times we have over 100 people to arrest, it would require about all those agencies joined together to make it work.
>
> ... [In December 1988] we knew that our clinic was gong to be hit and were able to plan and we were there long before it even got started. But it [the clinic] still went down, yes.

R.213-214. Notwithstanding some successful arrests and prosecutions, the blockades continued to occur. R.107.

The City has chosen to uses its available resources to try to keep the clinic open. It would be easier, but wrong, to request the clinic to close. It is easier, but wrong, to ask a controversial organization not to march and express their views when it is apparent that there will be vocal, possibly violent, objections from bystanders.

The City agrees with the legal arguments made by the plaintiffs and the *amici*. It is the purpose of this brief to apprise the court of the very practical considerations involved in this case as City officials have lived through them.

CONCLUSION

For the reasons stated in the foregoing brief of *Amicus Curiae* the City of Falls Church, the decision of the United States Court of Appeals for the Fourth Circuit Court should be affirmed, thereby sustaining the injunction that has permitted the equal enforcement of state law to all persons in Falls Church without regard to whether they seek to exercise unpopular rights.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, OPERATION RESCUE, et al.,

Petitioners,

vs.

ALEXANDRIA WOMEN'S HEALTH CLINIC, NATIONAL ORGANIZATION FOR WOMEN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE ATTORNEYS GENERAL OF THE STATE OF NEW YORK AND THE COMMONWEALTH OF VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici are the Attorneys General of States whose health care facilities have been targets of blockades and other conspiratorial activity by Operation Rescue and its local affiliates. *Amici* respectfully submit this brief in support of respondents Alexandria Women's Health Clinic, National Organization for Women, and other respondents.

The conspiratorial activities of Operation Rescue are intended to hinder, and have hindered, the ability of law enforcement

authorities in the States represented by *amici* to maintain law and order. Those activities have also hindered women seeking reproductive health care their right to the equal protection of the laws. Operation Rescue's activities have severely strained the law enforcement and judicial resources of the affected states and localities.

As chief legal officers and representatives of state government, *amici* have a strong interest in ensuring that civil peace is maintained and in protecting the right of citizens to engage in lawful protest activities. Because of the unlawful activities of petitioners, however, other citizens were deprived of rights to reproductive health care and abortion services. Moreover, the states have an interest in securing and maintaining the confidence of their citizens that once abortion services have been made available, those who limit access to such services by conspiratorial activity will be subject to the full force of all available legal remedies, state and federal. In addition, *amici* are committed to ensuring for all their citizens that the laws will be administered even-handedly and without interference by private conspirators, so that citizens may obtain meaningful assurance under the law of protection from discriminatory conduct and denials of equal protection of state-based and federal legal rights.

Amici have, as well, a strong interest in ensuring that their citizens are empowered by federal law to limit the unlawful and injurious activities of petitioners. Operation Rescue is engaged in a conspiracy that is national in scope; its *modus operandi* is to overwhelm state and local law enforcement resources. Actions brought under 42 U.S.C. § 1985(3) address the national scope of the conspiracy and support the efforts of states to maintain peace and order. *Amici* submit that compelling reasons exist for securing this meaningful federal remedy in the arsenal of remedies available to curtail and redress the harms of conspiracies such as the one at issue.

The State of New York and the Commonwealth of Virginia, by their Attorneys General, Robert Abrams and Mary Sue Terry, submit this brief pursuant to Supreme Court Rule 37.5.

ARGUMENT

INTRODUCTION

The blockades of health care clinics and other disruptive, health-threatening activities of Operation Rescue and its local affiliates, such as property vandalism of clinics, and harassment and intimidation of clinic patients and staff, present a problem of national scope. These actions go well beyond lawful protest aimed at securing changes in public policy. The magnitude of these activities is beyond the capability of any one state's laws or law enforcement authorities to redress effectively.

Operation Rescue is a nationwide conspiracy. *See e.g. Roe v. Operation Rescue*, 919 F.2d 857, 861 (3rd Cir. 1990) (The demonstrations in Philadelphia "constituted one phase of a well-orchestrated campaign to disrupt and shut down abortion clinics throughout the nation.") It seeks by unlawful means to undermine and overturn the exercise by women of certain federal constitutional rights, including the right to privacy and the right to decide whether to obtain an abortion, and the right to travel interstate for the purpose of seeking health care. *See New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

Operation Rescue also seeks to render ineffective the decisions made by various sovereign states about access to reproductive health care, including abortion, within the state. The conspiracy does not stop at seeking to deprive women of constitutional rights. It is also intended to prevent and hinder the states from securing for citizens the equal protection of local and state laws, such as public accommodation laws guaranteeing equality of access to health care, laws against trespass, harassment, and public nuisance, and those providing protection against interference with contractual relations.[1] The Operation Rescue

[1] These activities have been found to violate state laws, as well as federal constitutional rights. *See, e.g., NOW v. Operation Rescue*, 726 F. Supp. 1483 (E.D.

(Footnote continued)

conspiracy accomplishes this hindrance by overpowering the ability of the states to enforce their own laws and to keep the peace. It is precisely because of the dual purpose of Operation Rescue – to deprive women of the equal protection of the laws, and to hinder state authorities from securing public order – that the activities involved in this case present an especially compelling basis for the remedy provided by 42 U.S.C. § 1985(3).

If § 1985(3) were held not to be available to redress lawless interstate actions, state law would serve as the sole source for preserving the federal rights involved in this case. Such a result would undermine both state and federal interests. The right to interstate travel involved in this case is a right of *national* citizenship. *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Shapiro v. Thompson*, 394 U.S. 618 (1969). It is a right that transcends the boundaries and the authority of any one state to secure. This is especially true in the present situation, where Operation Rescue participants travel from state to state, blockading health care facilities without prior announcement or approval for demonstration by local authorities. This is part of their determined effort to close facilities to residents of the state as well as to women who travel interstate to obtain necessary health care. Certain states have been burdened disproportionately by the disruptions and lawlessness of Operation Rescue, because the number of providers of abortions and other reproductive services varies greatly from state to state. The activities of Operation Rescue make it difficult, if not impossible, for states to maintain unfettered interstate access, which is fundamental to the guarantee of equal protection and to the constitutional right to travel across state borders for lawful health services.

In urging that § 1985(3) provides redress here, *amici* do not seek to stifle legitimate debate on the abortion issue. Indeed, as this Court time and again has made clear, the First

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Va. 1989), *aff'd*, 914 F. 2d 582 (4th Cir. 1990); *New York State NOW v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989), *aff'd*, 886 F. 2d 1339 (2d Cir. 1989), *cert. denied*, 110. S. Ct. 2206 (1990); *Roe v. Operation Rescue*, 919 F. 2d 857 (3rd Cir. 1990).

Amendment enshrines peaceful protest and assembly. *E.g. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1983); *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 915 (1981). These and other decisions are reason for confidence that the remedies available under § 1985(3) can be applied – without penalizing the expression of political views – when actions in furtherance of a conspiracy transgress valid time, place and manner restrictions.

I. THE EXPRESS STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF § 1985(3) DICTATE THAT THE STATUTE APPLIES WHEN, AS HERE, AN INTERSTATE CONSPIRACY SEEKS TO INTERFERE WITH A STATE'S ABILITY TO SECURE THE EQUAL PROTECTION OF RIGHTS UNDER STATE AND FEDERAL LAW

According to its explicit language, § 1985(3) is designed to reach two principal sorts of conspiracies: conspiracies "for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"; and conspiracies

> for the purpose of preventing or hindering the constituted authorities of any State or territory from giving or securing to all persons within such State or Territory the equal protection of the laws.

As Respondents' brief demonstrates, Operation Rescue is certainly the first sort of conspiracy. There can be no doubt that Operation Rescue and its local affiliates also constitute the second sort of conspiracy prohibited by § 1985(3). A central purpose of Operation Rescue is to frustrate the legal system of states and municipalities. Operation Rescue counsels disrespect for and disregard of a legal system that permits abortion and related reproductive health services, and that impartially enforces laws prohibiting trespass, disorderly conduct, and harassment, irrespective of the views on abortion of those who violate them.

There is ample evidence of Operation Rescue's position in the record of this case, in the findings of other courts that have entered orders restraining Operation Rescue, and in the pamphlets and publications of Operation Rescue and its founder, Randall Terry. Plaintiffs' Exhibit 11 (R. 472)[2] is an Operation Rescue pamphlet that calls on local authorities to ignore and abrogate federal constitutional rights:

> Our local civil authorities need not bow to [the Supreme Court]. Our local authorities have responsibility for this municipality. . . . In defiance of Supreme Court edicts, our community can refuse to tolerate legalized childslaughter. That is only a starting point.

When local authorities seek to fulfill their responsibilities, however, Operation Rescue advises wilfully violating local laws and flouting court edicts, because "[a]t the crux of Operation Rescue's philosophy is the belief that participants 'must break man's law to obey god's law.' " Note, Judicial Ineffectiveness: The Inability to Curtail Unlawful Right to Life Protest Activity, 35 N.Y.L.S. L. Rev. 447, 449 (1990) ["Judicial Ineffectiveness"]. Operation Rescue compounds this instruction to break the law with exhortations to disregard the lawful orders of courts, as well:

> The pro-aborts are completely misusing the civil justice system . . . . Judges need to know they should not capitulate. They also need to know very clearly that we will not be intimidated. . . . If a judge bows to the pressure of pro-abortion forces, he must know [that] . . . . [t]hese cases will take up precious time on an already overcrowded docket . . . . He will look foolish to the public for issuing an order because rescuers won't obey.

R. Terry, letter in Operation Rescue pamphlet, part of the record in *New York State NOW v. Terry*, 704 F. Supp. 1247 (S.D.N.Y.),

[2] Citations to the Record are to the Appendix filed with the U.S. Court of Appeals for the Fourth Circuit.

aff'd 886 F. 2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), quoted in Note, Judicial Ineffectiveness, at 450 n. 55.

There have been numerous findings of contempt against Operation Rescue participants for intentionally flouting court orders. *See, e.g., New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Roe v. Operation Rescue*, 919 F.2d 857 (3rd Cir. 1990); *NOW v. Operation Rescue*, 747 F. Supp. 760 (D.D.C. 1990) (contempt opinion at 1990 U.S. Dist. LEXIS 9017, No. 89-2968-LFO) (D.D.C. Jul. 30, 1990)).

A. *Providing A Remedy Against Private Conspiracies Intended to Hinder State Authorities from Securing Equal Protection Is One of The Essential Functions of § 1985(3)*

The legislative history of § 1985(3) demonstrates that the intent to reach just this sort of conspiracy — that is, a conspiracy that has the "purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws" — is one of the central aims of the statute. *Cf. Great American Fed. S & L. Ass'n v. Novotny*, 442 U.S. 366, 384 n. 5 (1979) (Stevens, J., concurring) (the quoted language from the statute "sheds important light on the meaning of the entire section.")

A particular motivation for section 2 of the Ku Klux Klan Act, from which § 1985(3) is derived, was the congressional desire to remedy lawless acts of intimidation that threatened the ability of the states to secure equal applications of their laws and of federal rights. *See* Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi. L. Rev. 402, 405 (1979). Section 2 of the original Act specifically enumerated conspiracies "to hinder the course of justice in state or territorial courts, or to injure any person for enforcing the equal protection of the laws." 17 Stat. 14, § 2 (1871).

As the Act evolved into the language now found in § 1985(3), the legislative concern with interferences with state law

enforcement remained. Congressman (later President) Garfield, in what has been called "[t]he most significant speech of the debate," R. Harris, The Quest for Equality 47 (1960), explained that the bill was a natural extension of the fundamental equal protection guarantee of the Fourteenth Amendment:

> [T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the [bill] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection. . . .

Cong. Globe, 42d Cong., 1st Sess. at app. 153 (1871).

Congressman Burchard, in summarizing the import of the amended bill, explained that conspiracies within the ambit of the section included "those designed to prevent the equal and impartial administration of justice. . . . The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection." *Id.*, app. at 315.

Congressman Poland of Vermont agreed:

> If a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing State authorities from carrying out their constitutional provision, then I do claim that we have the right to make such interference an offense against the United States.

Id., app. at 514.

Conspiracies that fall within the "prevent and hinder" clause of § 1985(3) also, by definition, implicate the state sufficiently to satisfy the requirement, emanating from the Fourteenth

Amendment, that there must be some "state involvement" in the deprivation of equal rights. *See Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971); *Great American Fed. S. & L. Ass'n v. Novotny*, 442 U.S. 366, 384-85 (Stevens, J., concurring). The state itself does not have to intend to deprive rights, or to concur with or support the private conspiracy. *See People, By Abrams v. II Cornwell Co.*, 695 F.2d 34, 41-43 (2d Cir. 1982), *modified on other grounds*, 718 F.2d 22 (1983). Indeed, as here, the states can actively endeavor to prevent the private conspiracy from working its harm. State involvement comes from private conspirators' prevention and hindrance of state authorities in enforcing and administering the laws. Nor is it necessary that the conspiracy be successful in preventing the state from using its laws to punish the conspirators.[3] *See also U.S. v. Price*, 383 U.S. 787 (1966).

Operation Rescue literature advises adherents that they can accomplish the aim of frustrating justice by turning out in masses at the blockades.

> The larger the group doing the rescue mission, the lighter the sentence. You should check how overloaded your city's jail and court systems are. In many, many cities, the courts and jails are too overloaded to deal with rescue missions.

R. Terry, To Rescue the Children 49 (1986). *See also*, Note, Judicial Ineffectiveness. Another Operation Rescue pamphlet, part of the Record below, which formed a basis for the district court's finding that Operation Rescue intentionally hindered state court authorities, announces:

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[3] It is irrelevant to the applicability of § 1985(3) that participants in Operation Rescue have in fact been convicted under local criminal provisions. *See* Brief Amicus Curiae in Support of Petitioners by Concerned Women of America. The hindrance of state authorities in this case comes primarily from the fact that Operation Rescue has shut down health care facilities and has rendered local law enforcement powerless to prevent the closure and has engaged in tactics to ensure that many blockade participants will never be arrested. The fact that some blockade participants have been arrested and convicted does not eliminate the hindrance of the state's ability to secure equal protection of the laws guaranteeing access to health care.

> 1000 or 1500 peacefully praying around an abortion mill will be *very difficult* to arrest! In many cases like this in other movements, the officials did not arrest people because of the sheer numbers involved.

R. 484 (emphasis in original). The demonstration that occurred in Falls Church Virginia on October 29, 1988 (during a national day of "rescue" activity) is evidence of this philosophy in execution:

> Typical of most "rescue" demonstrations, the rescuers outnumbered the Falls Church police officers on the scene that day. Even though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for more than six (6) hours.

726 F. Supp. 1483, 1489, n.4.

Operation Rescue "[p]articipants are instructed to delay each step of the arrest process to the best of their abilities." Note, Judicial Ineffectiveness, at 451. One of the ways this is accomplished is by "other protestors replac[ing] those taken away by simply rolling in and laying in the vacant spaces. The purpose of this is to prolong the demonstration for as long as possible." *Id.* at 451. *See also Cousins v. Terry*, 721 F. Supp. 426, 431 (N.D.N.Y. 1989) ("All the outside entranceways to [the health care clinic] were blocked by rotating groups of approximately 200 sit-in demonstrators. There were over 40 arrests.")

Another tactic intended to frustrate arrest involves demonstrators' lying down in front of police cars to prevent police from exiting the scene to take those arrested for booking. *Pro-Choice Network of Western New York v. Project Rescue*, Civ. 90-1004A (W.D.N.Y. Sept. 27, 1990). An additional method employed by Operation Rescue and local affiliates is for those arrested to refuse to give their real names, so that they must be held at least overnight before they can be processed by the system. *See, e.g.*, Gannett Westchester Newspapers, Feb. 25, 1991, p. A8; Buffalo News, October 29, 1989, p. B1; Rochester Democrat & Chronicle, Sept. 25, 1988, p. 1A; Note, Judicial Ineffectiveness.

The refusal of Operation Rescue and its local affiliates to notify authorities in advance of the location of a blockade, or to obtain necessary permits, where required, also deliberately hinders the ability of police to secure the equal protection of the laws. When protestors reach the site and block the entrance before the police can be notified and respond, the duration of blockades and thus the period during which women are denied health care is prolonged and could be life threatening.* As the district court below observed, "[l]imited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a clinic for some time." 726 F. Supp. at 1489 n.4. *See also New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989) (Operation Rescue held in contempt for failure to notify New York City police of date and location of blockade; failure prevented police from keeping clinic open and caused the city to incur substantial overtime costs); Note, Judicial Ineffectiveness, at 450-51.

Even when the authorities receive advance notice, however, the conspirators explore other tactics to frustrate the ability of the police to secure equal protection of the laws. As Police Lieutenant Gregory King of Falls Church, Virginia testified in the district court below,

> [In December 1985] we knew that our clinic was going to be hit and we were able to plan and we were there long before it got started. But [the clinic] still went down, yes.

R. 214.

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* While clinics are permitted to sue under § 1985(3), individual women seeking reproductive health care are often in no position to sue for the protections of local and state laws. Seeking reproductive health care, including abortion services, is an intensely private matter. Yet, Operation Rescue preys on fears of disclosure and uses the private nature of the matter to harass and intimidate women from exercising their rights. *See, e.g., Northeast Women's Center, Inc. v. McMonigle*, 868 F.2d 1342, 1346 (3rd Cir. 1989); *Chico Women's Health Center v. Scully*, 256 Cal. Rptr. 194 (Cal. App. 1989); *Pro-Choice Network of Western New York v. Project Rescue*, Civ. 90-1004A (W.D.N.Y. Sept. 27, 1990).

Despite the best efforts of state and local authorities, the massive nature of the blockades, coupled with the failure to alert the police, severely hampers the ability of the states to stop the conspiracy and thereby secure the equal protection of the laws for women seeking to exercise protected rights to reproductive health care. Here, the district court found that these tactics rendered the police "unable to prevent the closing of the clinic for more than six hours." 726 F. Supp. at 1489, n.4. As the Falls Church police lieutenant explained, the small department was overwhelmed, and even the combined efforts of the local police, the County sheriff, and the Virginia State Police were unavailing in opening the clinic. R. 213-214. So also, in the proceedings below, Captain Downs from the Forestville, Maryland, police department testified, "we're outnumbered. There's nothing we can do." R. 273. "I cannot pull all the resources from the county. . . . There's no help. We have 80 men, and I've already pulled the resources from the county and state police. And we're doing all we can do." R. 276. Similar helplessness on the part of police to keep clinics open was described in *New York State NOW* v. *Terry*, 704 F. Supp 1247 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied* 110 S. Ct. 2206 (1990); and *Cousins* v. *Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989).

When Congress enacted § 1985(3), it evinced its intent to afford a federal remedy to address the hindrances that conspiracies such as Operation Rescue pose to state authorities, particularly when the aim of these conspiracies is to force legal change by tactics of intimidation and coercion, rather than through orderly deliberation and democratic processes. *See* Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi. L Rev. 402, 405, 408-11. As the bill's sponsor, Congressman Shellabarger, remarked, "these barbed conspirators have the political aim . . . to trample into dust these newly acquired political rights of the freedman and the constitutions and laws which confer them." Cong. Globe, 42d Cong., 1st Sess. 517 (1871).

The concerns of legislators in 1871 are no less relevant to the Operation Rescue conspiracy. The expressed intent of the

Operation Rescue conspiracy is to coerce states into overturning reproductive health laws through a campaign of harassment and lawlessness. Operation Rescue hopes that besieging the communities in which those services are provided will force legislatures to decide that the cost of allowing the provision of certain health care services in a state is too high.

Operation Rescue literature is quite explicit about this aim. Randall Terry, the founder and leader of Operation Rescue, offers the following theory of how to accomplish legislative change: "legislative change (for good or evil) follows in the wake of street level activism and general unrest." R. Terry, To Rescue the Children 56. "If a wave of large rescue missions sweeps the country, politicians will see that we mean business, and the wheels will be set in motion to reverse" abortion laws. *Id.*, at 57.

Operation Rescue's philosophy of disruption endangers the principles of the rule of law upon which our nation and states are founded, and which § 1985(3) was designed to secure against the actions of private conspirators who, dissatisfied and impatient with the results of the democratic process, determine to take the law into their own hands. As this Court admonished in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967):

> No man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

388 U.S. at 320-21.

In contrast to those who through protest and assembly sought four decades ago to secure rights of citizenship, members of

Operation Rescue suffer no impediment to their access to the ballot or other discrimination. Nevertheless, they seek to subvert orderly political change through tactics which pose a grave hindrance to state authorities obligated to enforce the law even when controversial. When the states' ability to guarantee equal protection of law for all citizens is threatened, § 1985(3) must be available to secure the enjoyment of self-governance and the democratic process.

B. *The "Prevent and Hinder" Clause of § 1985(3) Applies to a State's Ability to Secure the Equal Protection of State and Federal Rights*

Both the legislative history of § 1985(3) and prior pronouncements of this Court confirm that conspiracies to "prevent and hinder" state authorities are actionable when the states are frustrated from securing to citizens the equal protection not only of federal rights, but also of state-law-based rights. The difficulties states encountered in prosecuting the Klan for its violations of state laws was one of the concerns behind the "prevent and hinder" clause in the statute. *See* Gormley, Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3), 64 Tex. L. Rev. 527, 566-71 (1985)("The very fear prompting the passage of section 1985(3) was that certain private individuals were effectively denying Negroes the equal application of the laws in state courts, despite evenly drawn laws." *Id.*, at 571). A private conspiracy motivated by animus against the constitutional rights of a class of persons may operate at two levels. First, in pursuit of the goal to effect deprivations of constitutional rights, the conspirators may engage in acts which violate state and local laws; then, to further the deprivation, the conspiracy may act to hinder the ability of state and local authorities to secure the protections of the state laws to the despised class. Section 1985(3) is applicable to both situations.

Representative Lowe explained at length how the latter situation could constitute a conspiracy by private actors, without direct state action, to deprive persons of the equal protection of the laws, and why, despite the absence of direct state action, a federal law could reach such a conspiracy:

> I understand the argument to be that inasmuch as the alleged lawless acts sought to be corrected by the bill are not done in pursuance of any law or act of the States, that there is no State authority or laws impeding the citizens in the enjoyment of their rights, the section quoted does not apply. It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect. . . . What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a State? If a State has no law upon its statute-book obnoxious to objection under the article referred to, but nevertheless permits the rights of citizens to be systematically trampled upon without color of law, of what avail is the Constitution to the citizen?
>
> The argument leads to the deduction that while the first section of the amendment [now 42 U.S.C. § 1983] prohibits all deprivation of rights by means of State laws, yet all rights may be subverted and denied, without color of law, and the Federal Government have no power to interfere. All you have to do, therefore, under this view, to drive every obnoxious man from a State, or slay him with impunity, is to have the law all right on the statute-book, but quietly permit rapine and violence to take their way, without the hinderance [sic] of local authorities. Such a position, Mr. Speaker, defeats itself by its own absurdities. The rights and privileges of citizens are not only not to be denied by a State, but they are not to be deprived of them.

Cong. Globe, 42d Cong., 1st Sess., at 375. In the Senate, Senator Freylinghuysen underscored the same point:

> It is a poor comfort to a community that has been outraged by atrocities, for the officials to tell them,

> "we have excellent laws on our statute books." It is the citizen's right to have laws for his protection, to have them executed, and it is the constitutional right and duty of the General Government to see to it that the fundamental rights of citizens of the United States are protected.

Id., at 501.

As a commentator who closely studied the legislative history on the source of the rights equally secured to citizens by § 1985(3) concluded:

> It is worth pointing out that section 1985(3) – unlike section 1983 – does not require the deprivation of some constitutional or federally protected right. It speaks only of the deprivation of the equal protection of the laws. Thus, the rights at stake in section 1985(3) cases need not be the more familiar first or fourteenth amendment guarantees, or any other right found in the United States Constitution. Instead, the rights at stake will normally be the equal protection of *state* laws – trespass laws, contract laws, property laws, and tort laws. These sorts of rights have a life all their own, with or without state action.

Gormley, Private Conspiracies and the Constitution, 64 Tex. L. Rev. at 571.

Decisions of this Court support that conclusion. In *United States v. Harris*, 106 U.S. 629 (1882), the Court found that an indictment that alleged a conspiracy to "prevent and hinder the constituted authorities of the State of Tennessee" from securing the "equal protection of the laws of Tennessee" stated a claim under the "hindering" clause of the criminal analogue of § 1985(3). The case involved a conspiracy by private defendants to break into a county jail and attack prisoners awaiting trial, in violation of state law. In *Briscoe v. LaHue*, 460 U.S. 325, 337-38 (1983), the Court also indicated that a conspiracy to prevent state authorities from securing equal protection of *state* laws

was one of the specific designs of § 1985(3). And, in *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971), the Court found that a complaint alleging that the purpose of the conspiracy was to prevent African-Americans from enjoying equal rights under the laws of the United States *and* the State of Mississippi stated a cause of action under § 1985(3).

No matter what the constitutional status of the right to determine whether to obtain an abortion, and regardless of whether Operation Rescue interferes with the right to interstate travel, the conspiracy involved in this case violates § 1985(3). At the heart of Operation Rescue's purpose and method is obstruction and hindrance of prompt, effective, and equal enforcement of state law. Through a panoply of tactics which overwhelm the police, shut down health care clinics, hinder police efforts to reopen them, and delay arrest or arraignment, Operation Rescue hinders state authorities from securing to citizens the equal protection of state laws prohibiting trespass, harassment, nuisance, and interference with contractual relationships. Operation Rescue also hinders state authorities from securing to citizens the equal protection of state public accommodation laws which guarantee equal access to health care. And, Operation Rescue hinders state authorities from offering to women the equal protection of state laws authorizing the availability of abortion services.[5]

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[5] Many states may continue to authorize abortion services even if *Roe v. Wade*, 410 U.S.113 (1973) were to be overruled. New York State, for example, legalized abortion services in 1970, three years before the Court found that the right to choose whether to have an abortion was a constitutionally protected right. Given the petitioners' aims, it is highly likely that they would continue to disrupt health care facilities offering abortion services in states where such services are authorized, no matter what the constitutional status of the abortion right. Thus, the conspiracy would continue to violate § 1985(3).

II. IT IS NECESSARY TO APPLY FEDERAL CIVIL RIGHTS LAW BECAUSE BOTH THE FEDERAL RIGHTS UNDER ATTACK IN THIS CASE AND THE OPERATION RESCUE CONSPIRACY TRANSCEND THE LIMITS AND AUTHORITY OF ANY ONE STATE

While it severely frustrates state-law-based rights, the Operation Rescue conspiracy fundamentally seeks to eviscerate women's federal constitutional rights: their right as citizens of the United States to travel interstate to obtain health care, *Doe v. Bolton*, 410 U.S. 178 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969); their right to determine whether to obtain an abortion, *Roe v. Wade*, 410 U.S. 113 (1973); and their Fourteenth Amendment right to the equal protection of both state and federal laws.

Moreover, the burdens and obstructions posed by Operation Rescue to women and to the targeted states are national in scope. Operation Rescue and its affiliates operate throughout the nation, wherever there are providers of abortion and related reproductive health services.[6] While the states have a strong interest in protecting federal constitutional rights, the obligation

[6] The geographical range of the numerous cases brought against Operation Rescue and local affiliates illustrates its high and sustained level of nationwide activity. *See, e.g., New York State NOW v. Terry*, 704 F. Supp. 1247 (S.D.N.Y.), *aff'd* 886 F.2d 1339 (2d Cir. 1989), *cert. denied* 110 S. Ct. 2206 (1990); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989); *Pro-Choice Network of Western New York v. Project Rescue and Operation Rescue*, Civ. 90-1004A (W.D.N.Y. Sept. 27, 1990); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989), *vacated* 915 F.2d 92 (2d Cir. 1990); *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989), *aff'd* 919 F.2d 857 (3rd Cir. 1990); *NOW v. Operation Rescue*, 747 F. Supp. 760 (D.D.C. 1990); *NOW v. Operation Rescue*, No. N-89-3098 (D. Md. Nov. 9, 1989); *Aradia Women's Health Center v. Operation Rescue*, No. 88-1539R (W.D. Wash. Jul. 7, 1989); *Portland Feminist Women's Health Center v. Advocates for Life and Operation Rescue*, 712 F. Supp. 165 (D. Or. 1988); *Southwestern Medical Clinics of Nevada v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), *appeal docketed*, No. 90-5519 (9th Cir. 1990).

does not and should not fall solely on states. No state, or group of states, is equipped alone to deal with and redress the deprivations of federal rights caused by the nationwide activity of Operation Rescue.

Through the application of § 1985(3), one of the most significant and serious effects of Operation Rescue – the interference with federal constitutional rights – can be redressed.[7] In recognition of this principle, the National Association of Attorneys General resolved, at its March, 1985 meeting in Washington, D.C., that:

> Whereas, there has been an increase across the country in the number and seriousness of attacks on facilities that provide abortions; and Whereas, there has been illegal harassment and intimidation of the people who work in or visit abortion clinics; and Whereas, these unlawful activities threaten the public safety and interfere with the exercise of constitutional rights; Now Therefore, Be It Resolved, that the National Association of Attorneys General condemns the threats and acts of violence and intimidation against abortion clinics, and calls for a swift and forceful response by all levels of law enforcement; . . . and the Department of Justice [is requested] to investigate and prosecute these activities. . . .

Oversight Hearings on Abortion Clinic Violence, Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary, House of Representatives, 99th Cong., 1st & 2nd Sess. at 130 (1985). Just as the National Association of Attorneys General recognized the need for federal criminal remedies under 18

[7] While some states, such as Massachusetts, have laws authorizing the Attorney General or private injured parties to bring civil actions to redress deprivations of state and federal rights, *see* Mass. Gen. L. ch.12, §§ 11 h, i, j (1988), such provisions do not obviate the need for federal law remedies, as well. The state courts should not be the sole place to which persons deprived of their federal constitutional rights can turn for relief. Indeed, such a result would be directly contrary to the intent of the Congress that enacted § 1985(3).

U.S.C. § 241, the criminal analogue to § 1985(3), it is imperative to preserve citizens' access to federal civil remedies that address the threats of this national conspiracy.

The experience of state and local authorities demonstrates that criminal prosecution and punishment under local laws are insufficient to deter repeated blockades and harassment. Operation Rescue participants are not deterred by jail or similar criminal sanctions because they believe the imposition of sanctions renders them "martyrs", and thus more effective proselytizers, for their cause. Many members have been arrested and sentenced multiple times because of repeated offenses at health care facilities all around the country. Thus, the best efforts of one locality may simply drive the conspirators to the clinic in the next town or the next state, while the deprivations of constitutional rights continue.

Finally, the federal remedy of § 1985(3) must be applied because the federal rights involved, particularly the right of every citizen to travel interstate, are larger than the concerns of any particular state. At the same time, certain states are disproportionately affected by the combination of the need of women to travel interstate to obtain abortion services and the disruptive and dangerous activities of Operation Rescue. The right to interstate travel, which can only be secured by the application of § 1985(3), is especially crucial in the context of abortion and reproductive health care services. Some states at present have within their borders very few providers of abortion services. For example, in 1988, the States of Arkansas, Delaware, Idaho, Kentucky, Mississippi, Nebraska, North Dakota, Rhode Island, South Dakota, Utah, West Virginia, and Wyoming had fewer than ten, and in some instances one or no providers of abortion services within the state. See NARAL Foundation, A State-By-State Review of Abortion Rights 186 (1991) (source of data: Alan Guttmacher Institute). Other states have a larger number. The States of Georgia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington have over fifty providers of abortion services, while the States of California, Florida, and

New York contain over 100 providers of this type of health care. *Id.* Obviously, certain states bear the brunt of Operation Rescue activities and of the attendant burdens.

Given the geographic maldistribution of this type of health care service, the residents of some states are practically unable to obtain needed, and perhaps urgent, health care unless they can engage in unimpeded interstate travel. Citizens of states with a dearth of abortion services have an interest in obtaining reproductive health care elsewhere, without interference and delay. And states which attract significant numbers of women patients from out of state have an equally strong interest in maintaining unimpeded access to their health care facilities for residents and nonresidents alike.

For these reasons, it is in the interest of the states that have borne the greatest brunt of Operation Rescue to ensure that the federal civil rights laws are fully available to the victims of Operation Rescue. Citizens' invocation of § 1985(3) in this situation must be available to protect the right to travel interstate to obtain health care. Such suits will supplement, and thereby preserve, the resources of those states that have been disproportionately disrupted by Operation Rescue either because of their geographical location close to other states with fewer providers, or precisely because of their sovereign legislative judgments regarding abortion regulation.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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IN THE
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OCTOBER TERM, 1991

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The Petition for Writ of Certiorari contained a list of all federal court cases of which petitioners were aware in which 42 U.S.C. § 1985(3) had been invoked against anti-abortion activities. Pet. at 13 n.4. For the convenience of the Court, petitioners hereby provide the following revised and updated list, current through September 30, 1991. According to a representative of West Publishing Company, the two district court opinions for which West Law citations are given below will appear in upcoming issues of Federal Supplement.

D.C. Circuit—*National Organization for Women v. Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989), later decision, 747 F. Supp. 760 (D.D.C. 1990)

1st Circuit—*Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521 (D. Mass. 1991)

2nd Circuit—*New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989); *Upper Hudson Planned Parenthood, Inc. v. Doe*, No. 90-CV-1084 (N.D.N.Y. Sept. 12, 1991); *Pro-Choice Network of Western New York v. Project Rescue of Western New York*, No. Civ. 90-1004A (W.D.N.Y. Sept. 27, 1990); *Town of West Hartford v. Operation Rescue*, No. 1189-400 PCD (D. Conn. July 23, 1991), *appeal pending*, No. 91-7801 (2nd Cir. docketed Aug. 7, 1991)

3rd Circuit—*Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989), *aff'd on other grounds*, 919 F.2d 857 (3rd Cir. 1990)

4th Circuit—*Northern Virginia Women's Medical Center v. Balch*, 617 F.2d 1045 (4th Cir. 1980); *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991); *National Organization for Women v. Operation Rescue*, No. 89-3038 (D. Md. Nov. 15, 1990); *Palmetto State Medical Center, Inc. v. Operation Rescue*, No. 90-2688 (D.S.C. May 14, 1990), *appeal pending on other grounds*, No. 90-2688 (4th Cir. ordered held in abeyance Mar. 6, 1991)

5th Cir.—*Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989)

6th Circuit—*Volunteer Medical Clinic, Inc. v. Operation Rescue*, No. Civ. 3-89-156 (E.D. Tenn. May 19, 1989), *appeal pending*, No. 90-5159 (6th Cir. argued Apr. 1, 1991)

7th Circuit—*Fort Wayne Women's Health Organization v. Brane*, Civ. No. F90-066 (N.D. Ind. May 8, 1990), prior order, 734 F. Supp. 849 (N.D. Ind. 1990)

8th Circuit—*Lewis v. Pearson Foundation, Inc.*, No. 87-894 C (2) (E.D. Mo. Jan. 15, 1988), *aff'd by an equally divided court*, 917 F.2d 1077 (8th Cir. 1990) (en banc), *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 10, 1991) (No. 90-1575); *Carhart v. Donlan*, No. CV 90-0-540 (D. Neb. filed Aug. 7, 1990)

9th Circuit—*Chico Feminist Women's Health Center v. Butte Glenn Medical Society*, 557 F. Supp. 1190 (E.D. Cal. 1983); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F. Supp. 165 (D. Ore. 1988); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), *dismissed*, No. CV 89-1181 (C.D. Cal. Jan. 31, 1990), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990); *Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991), prior decision, No. C88-1539R (W.D. Wash. Jan. 10, 1989), *appeal pending sub nom. Aradia Women's Health Center v. Vicknair*, No. 90-35457 (9th Cir. docketed June 18, 1990); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991)

10th Circuit—*Women's Health Care Services, P.A. v. Operation Rescue—National*, No. 91-1303-K (D. Kan. Aug. 7, 1991) (1991 WL 169516), *appeal pending*, No. 91-3250 (10th Cir. docketed Aug. 7, 1991).

11th Circuit—*Birmingham Women's Medical Center v. Operation Rescue*, No. CV-89-P-1261-S (N.D. Ala. Aug. 2, 1989); *Lucero v. Operation Rescue of Birmingham*, No. CV91-PT-1082-S (N.D. Ala. Aug. 15, 1991) (1991 WL 160491).

With the exception of the *Lewis* case in the Eighth Circuit, each of these cases involves a suit seeking relief

against anti-abortion picketing or obstruction at abortion facilities. *Lewis* is a suit by a woman alleging that a pro-life crisis pregnancy center wrongfully hindered her efforts to obtain an abortion.

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No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAYNE BRAY, OPERATION RESCUE, *et al.*,

Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF FOR RESPONDENTS ON REARGUMENT AND BRIEF FOR RESPONDENTS ON REARGUMENT

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On Writ Of Certiorari To The United States
Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR RESPONDENTS ON REARGUMENT

Respondents respectfully move this Court for leave to file the attached Brief for Respondents on Reargument. On June 8, 1992, this Court restored this case to the calendar. 119 L. Ed. 2d 561 (1992). Because of the potential significance of the recent decision in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), to the issues in this case; because of the potential significance of questions raised at oral argument by several members of this Court regarding the second clause of 42 U.S.C. § 1985(3), the hindrance

clause, Tr. of Oral Arg. 9, 11-12, 22-23, 25, 27, and the availability of injunctive relief for violations of § 1985(3), Tr. of Oral Arg. 47; and because the briefs submitted prior to the argument had not addressed those questions, it would assist the Court and prejudice no one to consider this Brief for Respondents on Reargument. Accordingly, Respondents respectfully move this Court, pursuant to Rule 25.6, for permission to file the attached Brief.

Respectfully submitted,

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Date: August 14, 1992

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BRIEF FOR RESPONDENTS ON REARGUMENT

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SUMMARY OF ARGUMENT

Respondents submit this supplemental brief in connection with the reargument of this case in order to apply the Court's decision in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), to the legal issues raised in this case and to address questions raised during oral argument that were not addressed in the parties' original briefs.

ARGUMENT

Introduction

In the aftermath of the Civil War, Congress was confronted by lawless mobs seeking to prevent Blacks from exercising a wide range of political and economic rights. In 1871, Congress enacted the Ku Klux Klan Act ("the Act"), including the portion which is currently codified at 42 U.S.C. § 1985(3), to assist state and local authorities in restoring the rule of law to protect newly freed slaves and their supporters from mob violence. As the text of § 1985(3) indicates, Congress intended this section of the Act to afford federal protection against mob rule that would parallel and reinforce the limits on state power codified in the Reconstruction Amendments. *See generally* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952). In 1992, this Court is confronted by lawless mobs seeking to prevent women from choosing whether to have an abortion. The plain language of the Act vests federal courts with the power and the duty to assist state and local authorities in preserving the equal enjoyment of the rule of law.

I. *PLANNED PARENTHOOD v. CASEY* SUPPORTS RESPONDENTS' ARGUMENT THAT A CONSPIRACY INTENDED TO DENY WOMEN CONSTITUTIONAL RIGHTS MEETS THE CLASS-BASED ANIMUS REQUIREMENT OF § 1985(3).

In *Planned Parenthood v. Casey*, this Court affirmed a woman's right to terminate her pregnancy. 112 S.Ct. 2791 (1992). As the Joint Opinion explained, "[t]he woman's right to terminate her pregnancy before viability is . . . a component of liberty we cannot renounce." *Id.* at 2817. This recent decision provides additional support for respondents' argument that women are a class within the meaning of § 1985(3) and that Operation Rescue acts with discriminatory animus when it blocks women from obtaining abortions. Resp. Br. 16-35.

Casey demonstrates once again why women are a protected class under § 1985(3). Women's reproductive capacity has long served as the rationale to deny women equal opportunities in the workforce and the political process. *See Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding exclusion of women from jury duty due to women's "special responsibilities" as the "center of home and family life"); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (upholding law restricting hours women could work, reasoning that, "[because] healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest"); *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J., concurring) (upholding prohibition on women practicing law because "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother"). In *Casey*, this Court recognized that "[t]hese views . . . are no longer consistent with our understanding of the family, the individual, or the Constitution." 112 S.Ct. at 2831.

Indeed, the Constitution commands that control of reproductive capacity is essential in order for women to control their destiny:

> [T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear . . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Casey, 112 S.Ct. at 2807.

Casey also confirms that mob violence intended to prevent women from exercising a right guaranteed to them by the Constitution evinces a class-based animus against women. *See* Resp. Br. 24-35. In *Casey*, the Court recognized that a woman's right to control her own body is a protected liberty interest in part because such control is vital if women are "to participate equally in the economic and social life of the Nation." 112 S.Ct. at 2809; *see also id.* at 2846 (Blackmun, J., concurring) ("restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality"). When, as here, a mob knowingly engages in unlawful activity designed to prevent the exercise of the right to control one's body, it strikes at the heart of the effort to make women truly "equal." Unlike the usual § 1985(3) case where a right available to all is selectively denied to a few because of their characteristics, this case involves a right

that is uniquely available to the members of the victim group because of, and as a counter-weight to, the very characteristic that renders the victim group vulnerable to being treated unequally in the first place.[1] Operation Rescue's conspiracy is an exercise in class-based animus because it is intended to perpetuate, by force rather than law, the unequal status of women that *Roe v. Wade*, 410 U.S. 113 (1973), and *Casey* sought to ameliorate. *See International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (discrimination against women of childbearing capacity is discrimination against women).[2]

II. OPERATION RESCUE ACTS "FOR THE PURPOSE OF PREVENTING OR HINDERING" LAW ENFORCEMENT AUTHORITIES FROM SECURING TO WOMEN EQUAL PROTECTION OF THE LAWS AND THUS VIOLATES THE HINDRANCE CLAUSE OF § 1985(3).

Two clauses of § 1985(3) apply on the record in this case. The arguments have thus far concentrated on the first clause of § 1985(3), the deprivation clause, rather than the

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[1] The fact that not all women would have standing to challenge a particular restriction, *see* Tr. of Oral Arg. 37-39, does not change the fact that the targeted class consists of all women. The question of standing is distinct from the nature of the class affected and the discriminatory animus directed at that class. If the Ku Klux Klan blockaded the entrance to an integrated school, only students who were registered at that school would have standing to challenge the blockade, despite the fact that the class to whom the animus is directed is more broadly defined as Blacks and their champions.

[2] *Casey*, like *Johnson Controls*, addressed burdens imposed on women, and thus is distinct from *Geduldig v. Aiello*, 417 U.S. 484 (1974), which dealt only with benefits to pregnant employees. *See* Resp. Br. 26-27.

second clause of § 1985(3), the hindrance clause, which prohibits the hindrance of local authorities:

> If two or more persons in any State or Territory conspire . . . for the purpose of *preventing or hindering the constituted authorities* of any State or Territory from giving or securing to all the persons within such State or Territory the equal protection of the laws . . . [any person injured thereby shall have a cause of action].

42 U.S.C. § 1985(3) (emphasis added).

Like the deprivation clause, the hindrance clause provides a cause of action when private conspiracies interfere with the exercise of protected rights. However, as discussed at oral argument, the hindrance clause operates distinctly from the deprivation clause. Tr. of Oral Arg. 9-11, 12, 22-23, 25, 27. *See also Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384 (1979) (Stevens, J., concurring); *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971) ("As for interference with state officials, § 1985(3) itself contains another clause dealing explicitly with that situation") (emphasis added); *Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91 (8th Cir. 1956) (relying on the hindrance clause to enjoin anti-desegregationist demonstrators from obstructing school officials' efforts to implement *Brown v. Board of Education of Topeka); see generally* Br. for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae ("NAACP LDEF Br."). Like the mob violence by the Ku Klux Klan that gave rise to the Act, the strategy of Operation Rescue is to hinder state and local officials from safeguarding a protected class's

enjoyment of their state and federal rights.[3] Operation Rescue's mob violence thus falls squarely within the coverage of § 1985(3)'s hindrance clause.[4]

Congress intended the hindrance clause to provide a means of federal relief from organized mobs that overwhelm local law enforcement authorities and disable them from securing the equal protection of the laws. *See, e.g.*, Cong. Globe, 42nd Cong., 1st Sess. 514 (1871) (Rep. Poland) (it is an offense if "somebody undertakes to step in and clog justice by preventing the State authorities from carrying out [the equal protection of the laws]"); *id.* at App. 315 (Rep. Burchard) (stating that hindrance of state's ability to secure equality of protection violates the statute).

Plaintiffs do not need to show that the state participated in the conspiracy in any way or agreed with its ultimate goals. *Griffin*, 403 U.S. at 98-99; *cf. Novotny*, 442 U.S. at 384 (Stevens, J., concurring) ("if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment . . . the private persons would then have violated

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[3] The existence of invidious discriminatory class-based animus has been shown in preceding deprivation clause arguments. *See* Resp. Br. 31-35 *supra* Point I. In any event, this Court has never held that the hindrance clause requires such animus. *See Kush v. Rutledge*, 460 U.S. 719, 725-26 (1983); NAACP LDEF Br. 27-33.

[4] Respondents produced ample evidence at the district court hearing demonstrating that petitioners' activities constitute a violation of the hindrance clause. *See* 726 F.Supp. 1483, 1489 n.4 (Pet. App. 22a-23a n.4); *see also* Resp. Br. 10-12. In accordance with Fed. R. Civ. P. 15(b), the issue was tried and thus is to be treated in all respects as if it had been raised in the pleadings. *See Brandon v. Holt*, 469 U.S. 464 (1985).

§ 1985(3)"). As the legislative history indicates, "[w]hether [the state's] failure is willful or the result of inability can make no difference." Cong. Globe, 42d Cong., 1st Sess. App. 251 (1871) (Sen. Morton). In order to remedy constitutional rights guaranteed against state infringement, such as the right to abortion, plaintiffs need demonstrate only that "the aim of the conspiracy is to influence the activity of the State" or "that the state was somehow . . . affected by the conspiracy." *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 830, 833 (1983) (discussing deprivation clause).

Here, an essential element of Operation Rescue's conspiracy is to impede state authorities from enforcing the federal right to which it objects. As the record shows, Operation Rescue purposefully pursues tactics such as keeping secret which clinics will be targeted, physically blocking all entrances and exits, defacing clinic property, strewing nails on parking lots and public streets, and overwhelming local police by the large number of arrests that need to be made to restore order, all of which hinder state and local authorities from affording the respondents equal protection of the laws. *See, e.g.*, 726 F. Supp. 1483, 1489-90 (Pet. App. 22a-23a); Br. of the Attorneys General of the State of New York and the Commonwealth of Virginia as Amici Curiae 6, 9-12 (describing Operation Rescue pamphlets). Indeed, the City of Falls Church has filed an amicus curiae brief in this case reaffirming its inability to guarantee women access to health care facilities that provide abortion and related services in the face of Operation Rescue blockades. Br. for Falls Church, Virginia as Amicus Curiae 5-12. Repeatedly faced with petitioners' unannounced, overwhelming demonstrations, local municipalities are unable to fulfill their duties without reinforcement, and even then are unable to prevent clinic closings and the attendant harm to the physical and

psychological well-being of the women patients. *Id.; see* Resp. Br. 10-12.

The record thus contains an ample evidentiary basis for reliance on the hindrance clause to affirm the federal injunction. This Court should give effect to Congress's expressed intent to provide a remedy when an organized mob overwhelms law enforcement authorities and prevents them from protecting the individual rights of a protected class.[5]

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[5] In addition, the deprivation clause of § 1985(3) may be violated if a conspiracy prevents members of a protected class from enjoying state laws prohibiting force and intimidation, and thereby interferes with that class's exercise of a federal constitutional right. *Stevens v. Tillman*, 855 F.2d 394, 404 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (Easterbrook, J.). Unlike 42 U.S.C. § 1983 which explicitly confines its reach to "rights, privileges or immunities secured by the constitution and laws," § 1985(3) speaks in terms of securing the "*equal protection of the laws*," a statutory phrase which includes the protections of state law. *See Briscoe v. LaHue*, 460 U.S. 325, 337-38 (1983); *Griffin*, 403 U.S. at 103. Congressional debate confirms this plain reading of the text. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 567 (1871) (statement of Sen. Edmunds indicating that state law violation, *e.g.* murder, combined with requisite class-based animus, was intended to fall within scope of statute). *See also* Ken Gormley, *Private Conspiracies and the Constitution*, 64 Tex. L. Rev. 527, 587 (1985) (concluding that "equal protection of the laws" includes state laws); Janis L. McDonald, *Starting From Scratch: A Revisionist View of 42 U.S.C. § 1985(3) And Class-Based Animus*, 19 Conn. L. Rev. 471, 484 n.50 & 51 (1987) (discussing legislative history of § 1985(3)).

This Court has yet to decide this issue, *see Carpenters*, 463 U.S. at 833-34, while lower courts have reached differing conclusions. *See Stevens v. Tillman*, 855 F.2d at 404; *Traggis v. St. Barbara's Greek Orthodox Church*, 851 F.2d 584, 587-89 (2d Cir. 1988) (discussing cases).

III. FEDERAL COURTS HAVE AUTHORITY TO GRANT INJUNCTIVE RELIEF FOR VIOLATIONS OF § 1985(3).

One member of this Court questioned whether injunctive relief is available for violations of § 1985(3), Tr. of Oral Arg. 47; *see* Br. for the United States as Amicus Curiae 7-8 n.8. Jurisdiction to grant equitable relief under § 1985(3) is provided by 28 U.S.C. § 1343(4), which explicitly authorizes injunctive relief in any case involving "civil rights." Section 1343(4) was enacted by Congress in 1957 to reinforce the remedial aspects of § 1985(3).[6] *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 610 (1979) (discussing legislative history). Moreover, even before the enactment of § 1343(4), courts ordered injunctive relief in § 1985(3) cases pursuant to their general powers of equitable relief under the All Writs Act, 28 U.S.C. § 1651. *Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91, 103 (8th Cir. 1956) (enjoining conspiracy against school integration) (citing cases in support of equitable relief).

---

[6] In 1874, in connection with the enactment of the Revised Statutes of the United States, the remedial and jurisdictional segments of the 1871 Act were separated. Although this portion of the remedial section is codified at 42 U.S.C. § 1985(3), the original jurisdictional provision, as amended in 1911, is codified at 28 U.S.C. § 1343.

CONCLUSION

For the foregoing reasons, and for the reasons provided in Respondents' Brief dated May 13, 1991, the decision of the United States Court of Appeals for the Fourth Circuit herein should be affirmed.

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SUPPLEMENTAL BRIEF FOR PETITIONERS ON REARGUMENT

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SUPPLEMENTAL BRIEF FOR PETITIONERS ON REARGUMENT

I. THIS COURT'S OPINION IN *PLANNED PARENTHOOD v. CASEY* DOES NOT SUPPORT RESPONDENTS' PROPOSITION THAT OPPOSITION TO ABORTION IS EQUIVALENT TO DISCRIMINATION AGAINST WOMEN.

Respondents' effort to satisfy the "class-based, invidiously discriminatory animus" requirement of § 1985(3), *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), hinges on establishing that opposition to abortion is equivalent to discrimination against women. Contrary to respondents' contention, Rearg. Br. 2-4, this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), lends no support to such a proposition. To the contrary, throughout the entire course of its abortion jurisprudence—from *Roe v. Wade*,

410 U.S. 113 (1973), through *Casey*—this Court has never grounded the abortion right on equal protection analysis, which would be the natural approach if restrictions on abortion did indeed constitute discrimination against women.[1]

The joint opinion for the Court in *Casey* grounded the abortion right on substantive due process—not equal protection. 112 S. Ct. at 2804-08. The constitutional analysis adopted in the joint opinion, *id.* at 2819-21, does not proceed along familiar equal protection lines. It would be curious indeed if, so soon after a comprehensive review of the issue, in which the Court relied in large part on the value of stare decisis, it were suddenly discovered that the abortion right is, as respondents would have it, grounded in equal protection, so that opposition to abortion constitutes discrimination against women. Such a conclusion would call into question the very method of analysis embraced by the joint opinion in *Casey*, and cast doubt on a wide range of federal statutes that single out abortion for special treatment. *See* Br. of U.S. as Amicus Curiae 1. In fact, the joint opinion in *Casey* confirmed inaptness of an equal protection approach to abortion by reaffirming that "[a]bortion is a unique act," implicating liberty interests "in a sense unique to the human condition and so unique to the law." 112 S. Ct. at 2807. *Accord Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures"). *Cf. Maher v. Roe*, 432 U.S. 464, 470-71 (1977) (denial of funding for abortion "involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases"); *Harris*, 448 U.S. at 322-23 (same).

Although respondents contended last year that this case "is precisely the situation for which the statute was

[1] This has not been due to oversight. One Justice viewed the manner in equal protection terms in *Casey*. *See* 112 S. Ct. at 2846-47 (opinion of Blackmun, J.).

written," Tr. of Oral Arg. 26, respondents now acknowledge that this is "[u]nlike the usual § 1985(3) case . . . ." Rearg. Br. 3. It is unlike the usual Section 1985(3) case because it "involves a right that is uniquely available to the members of the victim group." Rearg. Br. 3-4. That being so, it is logically impossible for petitioners to act with respect to that right with the "purpose of depriving [the group] of the *equal* protection of the laws, or of *equal* privileges and immunities under the laws." 42 U.S.C. § 1985(3) (emphasis added). If only the victim group can exercise the right, interfering with the right cannot deny the group equal protection or equal privileges and immunities compared to any other group. Such interference may be a deprivation of the group's rights, but it cannot be a deprivation of the group's *equal* rights.[2]

Petitioners' opposition to the "unique act" of abortion cannot be regarded as an effort to deny equal treatment to any group. Petitioners do not deny women what they permit to others; they are in no sense discriminating in their opposition to abortion. Perhaps petitioners' conduct would have violated the version of § 1985(3) originally introduced, which covered "any act in violation of the rights, privileges, or immunities of another," *see Griffin*, 403 U.S. at 101, but petitioners' conduct surely did not violate the version of the Act that became law, which was amended to focus on the denial of *equal* treatment, *id.* at 101-02.

Respondents err in relying on *International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991), to support their argument. *See* Rearg. Br. 4. As the Court made clear in *Johnson Controls*, the policy in question

[2] To embrace respondents' theory of gender discrimination, it would be necessary to conclude that if *men* could get pregnant and obtain abortions, petitioners would *not* try to stop them from aborting. There is no warrant whatsoever, in the record of this case, for such an absurd conclusion.

was discriminatory because it involved the *facially* unequal treatment of men and women. 111 S. Ct. at 1202-03. *See* Pet. Reply Br. 8-9. No such unequal treatment was shown in this case.

II. 42 U.S.C. § 1985(3) DOES NOT PROVIDE AN INJUNCTIVE REMEDY.

As respondents stated in the first sentence of their complaint, "[t]his is an action for declaratory and injunctive relief . . . ." J.A. 6. *See also ibid.* ("Plaintiffs . . . seek a limited injunction"). At no point in their complaint or elsewhere did respondents seek damages.[3] Because 42 U.S.C. § 1985(3) does not authorize injunctive relief, the decision below should be reversed.[4]

First, Section 1985(3) by its plain language authorizes only "an action for the recovery of damages," 42 U.S.C. § 1985(3). It does not mention injunctive relief. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *accord Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2720 (1989). On that basis, for example, this Court has held that a statute expressly authorizing private citizens to sue for injunctions would not be construed as implying a private right of damages. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15.

[3] The district court erroneously stated, in a passing footnote without citation, that respondents "also seek damages." Pet. App. 36a n.14. The court went on to note, however, that "plaintiffs offered no evidence as to the existence or amount of damage suffered." *Ibid.* The court of appeals recognized that respondents' suit was for injunctive relief, *see* Pet. App. 5a-6a, as respondents themselves have throughout this litigation, *see, e.g.*, Resp. Br. 4. Had respondents in fact sought damages, petitioners would have been entitled to a jury trial under the Seventh Amendment.

[4] *See* Br. for the U.S. as Amicus Curiae 7-8 n.8. The question whether the statute authorizes the type of relief plaintiffs seek is both "antecedent" to the question whether the statute covers petitioners' conduct and "ultimately dispositive of the present dispute." *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990). Accordingly, this Court may consider that threshold question even though it was not raised or decided below. *Ibid.* (adopting construction of statute not argued by parties or considered by lower courts). This is different from respondents' "prevent or hinder" claim, which respondents attempted to raise in their supplemental brief on reargument, because that claim seeks to introduce a different and independent basis for relief into the case at this late stage.

Second, Section 1985(3) was enacted as Section 2 of the Ku Klux Klan Act of 1871, and Congress demonstrated in Section 1 of the same Act that it knew how to provide for equitable relief when it wanted to do so. Section 1—enacted at the same time as Section 2—is codified as 42 U.S.C. § 1983. It provides expressly for "an action at law, *suit in equity*, or other proper proceedings for redress." 42 U.S.C. § 1983 (emphasis added). In contrast, in Section 2, Congress limited the available relief to "an action for the recovery of damages." 42 U.S.C. § 1985(3). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and citations omitted). *See also Gozlon-Peretz v. United States*, 111 S. Ct. 840, 847 (1991); *General Motors Corp. v. United States*, 110 S. Ct. 2528, 2534 (1990).

Third, "Section 1985(3) provides no substantive rights itself; it merely provides *a remedy* for violation of the rights it designates." *Great Am. Fed. Sav. and Loan*

Ass'n v. Novotny, 442 U.S. 366, 372 (1979) (emphasis added). *See also United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983). Because the *only* congressional purpose for the passage of § 1985 was to specify "a remedy" for the violation of rights which already existed under the Constitution, it would be absurd to suggest that Congress might have intended to create other remedies which it simply forgot to mention. For that same reason, there is no basis for *implying* any additional, unexpressed remedies under Section 1985(3) to vindicate *rights conferred under that statute*, because the *statute confers no rights*. This case is therefore unlike *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), where the Court implied a remedy under 42 U.S.C. § 1982 when that statute conferred a substantive right without an explicit remedy.

Taken together, § 1983 and § 1985—originally § 1 and § 2 of the same Act—reflect a congressional determination that *any* conspirator who violates constitutional rights (with, respectively, the requisite state action or animus) should be answerable in *damages*. On the other hand, Congress authorized the drastic remedy of an *injunction* to prevent such deprivations *only* in the extraordinary case where the offenders act with the assistance of local authorities, who therefore cannot be trusted to remedy such deprivation themselves. By refusing to furnish a federal injunctive remedy except where the defendants acted in conspiracy with State officials, Congress implicitly signaled its recognition that purely private conspiracies to violate constitutional rights are best handled by State and local governments, which traditionally have played the primary role in the maintenance of public order. Seen in this light, the differing remedies furnished by Congress in § 1983 and § 1985 reflect the same concerns for federalism that were later identified by this Court as the basis for abstention in *Younger v. Harris*, 402 U.S. 37 (1971).

Accordingly, because § 1985(3): (1) is a purely remedial statute, (2) explicitly mentions a remedy other

than equitable relief, (3) does not provide for injunctive relief, and (4) immediately follows a companion section that provides for injunctions under certain narrower circumstances, well-settled principles of statutory construction compel the conclusion that injunctive relief is not available under § 1985(3). *Accord Cuban v. Kapoor Bros., Inc.*, 653 F. Supp. 1025, 1033 (E.D.N.Y. 1986) (injunctive relief "is unavailable under section 1985; the statutory remedy is limited to the recovery of damages") (citation omitted); *Mullarkey v. Borglum*, 323 F. Supp. 1218, 1228 (S.D.N.Y. 1979) ("While plaintiffs have made out a claim under § 1985(3), however, they are not entitled to a preliminary injunction. The statutory remedy provided . . . is set forth at the end of § 1985(3), and is limited to 'the recovery of damages' ").

Respondents essentially concede that § 1985(3) does not itself authorize injunctive relief, and argue instead that 28 U.S.C. § 1343(a)(4) authorizes such relief. Rearg. Br. 9. That argument is clearly mistaken. Section 1343 (a)(4) is a general jurisdictional provision. It provides district court jurisdiction over actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." If the specific Act of Congress relied upon does not itself authorize injunctive relief, however, this jurisdictional provision cannot expand the relief available. *Cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-577 (1979) (rejecting the argument that a jurisdictional provision in a statute can give rise to cause of action: "[t]he source of plaintiff's rights must be found . . . in the substantive provisions . . . , not in the jurisdictional provision").

Indeed, 28 U.S.C. § 1343 as a whole confirms what the text of 42 U.S.C. § 1985(3) plainly provides—that the only available remedy is for damages. When Congress specifically mentioned Section 1985 in the text of 28 U.S.C. § 1343, it expressly limited the grant of jurisdiction to jurisdiction "[t]o recover damages." *See* 28 U.S.C.

§ 1343(a)(1) (jurisdiction "[t]o recover damages [due to] any act done in furtherance of any conspiracy mentioned in § 1985 of Title 42"); 28 U.S.C. § 1343(a)(2) (jurisdiction "[t]o recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in § 1985 of Title 42"). Since Section 1985 only authorizes an action to recover damages, this jurisdictional limitation where Section 1985 is explicitly mentioned makes perfect sense. The provisions of § 1343 that are *not* limited to jurisdiction "[t]o recover damages," by contrast, do not specify 42 U.S.C. § 1985. Instead, these provisions apply more generally to actions under "the Constitution of the United States or . . . any Act of Congress providing for equal rights of citizens," 28 U.S.C. § 1343(a)(3), or to "any Act of Congress providing for the protection of civil rights," 28 U.S.C. § 1343(a)(4). There are, of course, provisions within these broad categories that—unlike Section 1985—do authorize injunctive relief, which explains the broader jurisdictional grant than in the provisions that specifically mention Section 1985.

The legislative history of 28 U.S.C. § 1343(a)(4) further confirms that 42 U.S.C. § 1985(3)—in providing "an action for the recovery of damages"—means what it says. The only report on the bill that added § 1343(a)(4) expressly noted that § 1985(3) "establishes liability *for damages*." H.R. Rep. No. 291, 85th Cong., 1st Sess. 10 (1957) (emphasis added). Indeed, the Report referred to Section 1985 generally as "provid[ing] a civil remedy *in damages* to a person damaged as a result of conspiracies to deprive one of certain civil rights." *Id.* (emphasis added). Section 1343(a)(4) accompanied a proposal to give the Attorney General (*not* private parties) authority to seek injunctive relief under Section 1985(3), H.R. Rep. No. 291, *supra*, at 10-11; Section 1343(a)(4) was proposed only as a "technical amendment[]" to existing law to give district courts jurisdiction to entertain the Attorney General's requests. H.R.

Rep. No. 291, *supra*, at 11. Yet even that limited authority to seek injunctive relief was not enacted, although § 1343(a)(4) was. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 610 (1979). In sum, the legislative history of 28 U.S.C. § 1343(a)(4) confirms that district courts lack authority under 42 U.S.C. § 1985(3) to award injunctive relief.

Finally, respondents' belated reliance on "general powers of equitable relief under the All Writs Act, 28 U.S.C. § 1651," Rearg. Br. 9, is plainly a make-weight. As this Court explained, "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Here § 1985(3) specifically addresses the question of what relief it provides: "an action for the recovery of damages." 42 U.S.C. § 1985(3). The general provisions of the All Writs Act cannot be used to override the specific limitations in § 1985(3) itself.[5]

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[5] The only case respondents cite on this point is *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91 (8th Cir. 1956). The court in that case expressly found that an injunction was proper on other grounds apart from § 1985(3), and recognized that § 1985(3) "does not expressly accord . . . a right to injunctive relief . . . . The specific grant is of a right of action for recovery of damages occasioned by acts done in furtherance of [a] conspiracy." 238 F.2d at 103. Having already found a basis for injunctive relief on other grounds, the court went on to find that § 1985(3) affords "additional support to the federal jurisdiction and the issuance of the injunction." 238 F.2d at 104.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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September 16, 1992

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No. 90-985-CFX
Status: GRANTED

Title: Jayne Bray, et al., Petitioners
v.
Alexandria Women's Health Clinic, et al.

Docketed:
December 18, 1990

Court: United States Court of Appeals for the Fourth Circuit

See also:
90-1575

Counsel for petitioner: Sekulow,Jay Alan

Counsel for respondent: Schafer,John H., Burns,Sarah

Entry	Date	Note	Proceedings and Orders
1	Dec 18 1990	G	Petition for writ of certiorari filed.
2	Jan 22 1991		Brief of respondents Alexandria Clinic, et al. in opposition filed.
3	Jan 23 1991		DISTRIBUTED. February 15, 1991
4	Feb 1 1991	X	Reply brief of petitioners Jayne Bray, et al. filed.
6	Feb 15 1991		REDISTRIBUTED. February 22, 1991
7	Feb 25 1991		Petition GRANTED.
			**********
8	Apr 9 1991		Joint appendix filed.
9	Apr 11 1991		Brief amici curiae of Feminists for Life of America, et al. filed.
10	Apr 11 1991		Brief amici curiae of Daniel Berrigan, S.J., et al. filed.
11	Apr 11 1991		Brief amicus curiae of Rutherford Institute filed.
12	Apr 11 1991		Brief of petitioners Jayne Bray, et al. filed.
13	Apr 11 1991		Brief amicus curiae of Free Congress Foundation filed.
14	Apr 11 1991		Brief amicus curiae of Concerned Women for America filed.
15	Apr 11 1991		Brief amicus curiae of United States filed.
16	Apr 11 1991		Record filed.
		*	Lodging received, 9 copies
17	Apr 11 1991		Brief amici curiae of National Right to Life Committee, Inc., et al. filed.
18	Apr 11 1991		Brief amicus curiae of American Victims of Abortion filed.
19	Apr 11 1991		Brief amici curiae of Women Exploited by Abortion, et al. filed.
20	Apr 11 1991		Brief amicus curiae of Southern Center for Law & Ethics filed.
21	Apr 11 1991		Brief amicus curiae of James Jospeh Lynch, Jr. filed.
22	Apr 11 1991		Brief amici curiae of George Lucas, et al. filed.
23	Apr 19 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	May 13 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
25	May 13 1991		Lodging received, 10 copies (Box)
26	May 13 1991		Brief amicus curiae of 29 Organizations Committed to Women's Health filed.
27	May 13 1991		Brief amicus curiae of Falls Church, VA filed.
28	May 13 1991		Brief amici curiae of National Abortion Federation, et al. filed.
29	May 13 1991		Brief of respondents Alexandria Clinic, et al. filed.
30	May 13 1991		Brief amici curiae of Attorneys General of the State of New

No. 90-985-CFX

Entry	Date	Note	Proceedings and Orders
			York, et al. filed.
31	May 13 1991		Brief amici curiae of ACLU, et al. filed.
32	May 13 1991		Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
33	Jun 12 1991		Reply brief of petitioners Jayne Bray, et al. filed.
34	Jul 12 1991		CIRCULATED.
36	Jul 24 1991		Certified copy of original record and proceedings, 8 Volumes, in one box received.
37	Oct 3 1991	X	Supplemental brief of petitioners Jayne Bray, et al. filed.
38	Oct 11 1991		Copy of the injunction dated September 20, 1991 received and distributed.
39	Oct 16 1991		ARGUED.
40	Jun 8 1992		The case is restored to the calendar for reargument.
41	Jul 21 1992		SET FOR ARGUMENT TUESDAY, OCTOBER 6, 1992. (1ST CASE).
42	Aug 14 1992	G	Motion of respondents for leave to file a brief on reargument filed.
43	Sep 2 1992		Motion of respondents for leave to file a brief on reargument GRANTED. with respect to arguments addressing the potential significance of Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), and the availability of injunctive relief for violations of 42 U. S. C. Section 1985(3), but denied with respect to arguments addressing the hindrance clause of 42 U. S. C. Section 1985(3). Petitioners are invited to file a supplemental brief on reargument to be filed on or before September 17, 1992, responding to respondents' arguments regarding Planned Parenthood v. Casey, and the availability of injunctive relief. Justice O'Connorwould grant the motion in its entirety. Justice Stevens, dissenting, with whom Justice Blackmun joins: In a statutory construction case that is important enough to merit regargument, the Court should err on the side of allowing full discussion of the entire statute at issue. Without having examined the supplemental brief attached to respondent's motion, and noting the absence of any objection from petitioners, I would therefore allow it to be filed as a matter of course. Because I intend to read the entire supplemental brief in preparation for the reargument -- despite the Court's peculiar order -- I would welcome comment by petitioners on all issues discussed therein.
44	Sep 16 1992	X	Supplemental brief of petitioners on reargument filed.
45	Oct 6 1992		ARGUED.